



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

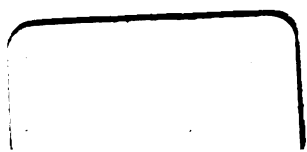
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED

IN

The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
CRESSWELL CRESSWELL, OF THE INNER TEMPLE, ESQs.
BARRISTERS AT LAW.

V O L. I.

Containing the Cases of MICHAELMAS, HILARY, and EASTER
Terms, in the 3d and 4th Years of GEO. IV. 1822, 1823.

L O N D O N :

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. BUTTERWORTH AND SON, LAW-BOOKSELLERS, 43. FLEET-STREET;
AND J. COOKE, ORMOND-QUAY, DUBLIN.

1823.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAS DEPARTMENT.

a. FROM

1061 98 NDI

J U D G E S
OF THE
COURT OF KING's BENCH,
During the Period of these REPORTS.

Sir CHARLES ABBOTT, Knt. C. J.

Sir JOHN BAYLEY, Knt.

Sir GEORGE SOWLEY HOLROYD, Knt.

Sir WILLIAM DRAPER BEST, Knt.

ATTORNEY-GENERAL.

Sir ROBERT GIFFORD.

SOLICITOR-GENERAL.

Sir JOHN SINGLETON COPLEY.



REPORTED IN THIS VOLUME.

A		Page	Barthrop, Moore, Assignee of Barthrop, v.	Page
ABBOTT and Others,				5
Carter, Assignee, v.	444	Bellamy, Rex v.		500
Abson v. Fenton and Another	195	Benn, Daws v.		751
Addis, Ex parte	87	Bennett and Another, Rick-		
Allan, Girdlestone v.	61	ards v.		223
All Saints Cambridge, Inha-		Berkswell, Inhabitants of,		
bitants of, Rex v.	23	Rex v.		542
Andrews, West v.	77	Berry v. Pratt		276
Arnison, Ellis v.	70	Biddell v. Leeder and Pul-		
Arthur, Vyvyan v.	410	ham		327
Ashton, Dyer v.	3	Bignold v. Lee		285
		Birmingham Gas-light and		
		Coke Company, Rex v.		506
		Bodenham v. Pritchard		350
		Boone v. Mitchell		18
		Boughey and Another, Rex		
		v.		565
		Bourn, Longden v.		278
		Bower, In the Matter of		264
				Bower
B				
Baker v. Dewey	704			
Baldwin and Others v.				
Richardson and Another	245			
Barclay, Laing v.	398			

TABLE OF CASES REPORTED.

vii

	Page		Page
Eicke v. Sowerby	287	Gunson and Others, Assignees,	
Elis v. Arnison	70	v. Metz	193
Eye, Bailiffs and Corporation of, Rex v.	85		
		H	
F		Hagworthingham, Inhabit-	
Featherstone v. Hunt and Others	113	ants of, Rex v.	634
Fenton and Another, Abson v.	195	Hall, George, Rex v.	123
Ferrybridge, Inhabitants of, Rex v.	375	— Rex v.	237
Firth v. Robinson	277	— v. Smith	407
Flanagan v. Watkins	316	Hammond, Durden and Another v.	111
Fletcher, Drew v.	283	Harvey, Doe dem. Sutton, Bart. v.	426
Flint, Gent. one, &c. In the Matter of	254	Harvey and Others, Assignees, v. Ramsbottom	55
Formby, Summers v.	100	Hasselden, Bradney and Ano- ther v.	121
Forrest, Sard and Another v.	139	Hembrey, Priddy and Ano- ther v.	674
Forster and Others, Hodg- son v.	110	Heyman, Hoffman and Ano- ther v.	7
Foster and Others, Pittam v.	248	Higgins, Holmes v.	74
Frost, Doe dem. Orpe v.	638	Hodgkinson and Others, As- signees, v. Travers	257
Fowle, Executor of Wood- man, v. Welsh	29	Hodgson v. Forster and Others	110
		— Kirkley and Ano- ther v.	588
G		Hoffman and Another v. Hey- man	7
Gadderer, Peers v.	116	Holbrow and Another v. Wil- kins	10
Gardiner, Lord Hunting- tower v.	297	Hollis v. Goldfinch and Others	205
Gibbs, Ramsden and Ano- ther v.	319	— Proud v.	8
Ginders v. Moore	654	Holmes v. Higgins	74
Girdlestone v. Allan	61	Humphrey Williams, Rex v.	609
Glenville v. Hutchins	91	Hunt and Others, Feather- stone v.	113
Goddard, Doe dem. Nepean, Bart. v.	522	Huntingtower, Lord, v. Gardi- ner	297
Goldfinch and Others, Hol- lis v.	205	— v. Ireland	297
Graham, Milne v.	192	Hustler, Leeds and Liverpool Canal Company v.	424
Grundy, Doe dem. Pain v.	284	Hutchins,	

	Page		Page
Hutchins, Glenville v.	91		
Hutchinson and Others, War-		L	
ter and Others v.	721		
I			
Impey and Others, Doswell v.	163	Laing v. Barclay	398
Ireland, Lord Huntingtower v.	297	Lackenheath, Inhabitants of,	
Iveson, Gent. one, &c. v. Con-		Rex v.	531
ington, Gent. one, &c.	160	Lea, Price and Others v.	156
J		Lee, Bignold v.	285
Jackson, Doe dem. Newby v.	448	— v. Shore and Others	94
— v. Pearson and		Leeder and Pullham, Biddell	
Another	304	v.	327
— and Wood, In the		Leeds and Liverpool Canal	
Matter of	270	Company v. Hustler	424
Jeffreys, Rex v.	604	Legge, Sprowle v.	16
Jenkins, Ex parte	655	Leigh, Claughton, Esq. v.	652
Johnson v. Lindsay	247	Levi, Ward v.	268
— Williamson v.	146	Lindsay, Johnson v.	247
Jones v. Davies and Others	143	Lingard and Another, As-	
— Doe dem. Jones and		signees, v. Messiter	308
Others v.	238	Linn, Winstone and Another	
— v. Thorne	715	v.	460
K		Longden v. Bourn	278
Kelly and Others, Woolley,		Lorymer v. Smith	1
Executrix, v.	68	Lovie, Macpherson v.	108
Kent, Justices of, Rex v.	622	M	
Kenworthy, Rex v.	711	Manchester and Salford Wa-	
Key v. Brown	653	ter Works Company, The	
Kirk, Rex v.	21	King v.	630
Kirkley and Blagburn, As-		Macpherson v. Lovie	108
signees, v. Hodgson	588	Mackynlleth and Pennegoes,	
Kitchen, Crum v.	269	Rex v.	142
Kite and Lane's case	101	Marryat, Drake v.	473
Krans and Others, Ex parte	258	Marriott, Spencer and An-	
		other v.	457
		Messiter, Lingard and An-	
		other, Assignees, v.	308
		Metz, Gunson and Others,	
		Assignees, v.	193
		Milne v. Graham	192
		Mitchell, Boone v.	18
		— v. Mitcheson	513
		Moore,	

TABLE OF CASES REPORTED.

ix

	Page		Page
Moore, Assignee of Barthrop, v. Barthrop	5	Poynder, Rex v.	178
Moore, Ginders v.	654	Pratt, Berry v.	276
N		Prestidge v. Woodman and Others	12
		Price and Others v. Lea	156
		Priddy and Another v. Hen- brey	674
		Prince v. Clark	186
		Pring v. Clarkson	14
		Pritchard, Bodenham v.	350
		Proone, Richley v.	286
		Prosser and Others, Collins and Others v.	682
		Proud v. Hollis	8
		R	
Neale, Administratrix of Whittle, v. Reid	657	Ramsbottom, Harvey and Others, Assignees, v.	55
Newling v. Pearse	437	Ramsden and Another v. Gibbs	319
Newman, Edmeads and Others v.	418	Regula Generalis	288. 656
Nicholls, Doe dem. Player v.	336	Reid, Neale, Administratrix of Whittle, v.	657
Nohro, Ex parte	267	Rex v. All Saints, Cambridge	23
North Collingham, Inhabit- ants of, Rex v.	578	— v. Bellamy	500
Novello v. Toogood	554	— v. Berkswell, Inhabit- ants of,	542
Noyes, Pickering v.	262	— v. Birmingham Gas Light and Coke Company	506
O		— v. Boughey and Another	565
		— v. Bower, Richard	492
		— v. Bower, Samuel	585
		— v. Buckinghamshire, Justices of,	485
		— v. Cherry Willingham	626
		— v. Commissioners of Sewers for Essex	477
		— v. Cumberland, Justices of	64
		— v. Devonshire	609
		— v. Earl of Portmore and and Another	551
			Rex
P		a	
Palmer, Rex v.	546		
Parker, Ross, Administrator, v.	358		
Peacock, Brandt v.	649		
Pearse, Newling v.	437		
Pearson and Another, Jack- son v.	304		
Peers v. Gadderer	116		
Pennegoes and Mackynlleth, Inhabitants of, Rex v.	142		
Pickering v. Noyes	262		
Pilgrim, Ex parte	264		
Pittam v. Foster and Others	248		
Portmore and Another, Rex v.	551		
Portmore, Earl of, v. Bunn	694		

TABLE OF CASES REPORTED.

	Page		Page
Rex v. Eye, Bailiffs and Corporation of	85	Rickards v. Bennett and Another	223
— v. Ferrybridge, Inhabitants of	375	Robinson, Firth v.	277
— v. Hagworthingham, Inhabitants of	634	Roe, Doe dem. Davies and Wife v.	118
— v. Hall, George Webb	123	Rogier and Humphrey, Rex v.	272
— v. Hall	237	Ross, Administrator, v. Parker	358
— v. Jeffreys	604	Rotherfield Greys, Oxon, Inhabitants of, Rex v.	345
— v. Kent, Justices of	622	Rushworth, Gent. v. Wilson	267
— v. Kenworthy	711	Russell, Earl of Shaftesbury v.	666
— v. Kirk	21		
— v. Lackenheath, Inhabitants of	531		
— v. Manchester and Salford Water Works Company	630		
— v. North Collingham, Inhabitants of	578		
— v. Oxfordshire, Justices of	279		
— v. Palmer	546		
— v. Pennegoes and Mackynlleth, Inhabitants of	142		
— v. Portmore, Earl of	551		
— v. Poynder	178		
— v. Rogier and Humphrey	272		
— v. Rotherfield Greys, Oxon	345		
— v. Sudbury, Mayor, Aldermen, and Burgesses of	389		
— v. Sutton St. Edmunds, Inhabitants of	536		
— v. Susannah Palmer	546		
— v. Trent and Mersey Navigation Company	545		
— v. Waddington	26		
— v. Weir and Others	288		
— v. Whitchurch, Inhabitants of	574		
— v. Wilyams	609		
Richardson and Another, Baldwin and Others v.	245		
Richley v. Proone	286		
		S	
		Sard and Another v. Forrest	139
		Shaftesbury, Earl of, v. Russell	666
		Shore and Others, Lee v.	94
		Smith, Hall v.	407
		— Lorymer v.	1
		Sowerby, Eicke v.	287
		Spencer v. Marriott	457
		Sprowle v. Legge	16
		Sudbury, Mayor, Aldermen, and Burgesses of, Rex v.	389
		Summers v. Formby	100
		Sutton St. Edmunds, Inhabitants of, Rex v.	536
		T	
		Thorne, Jones v.	715
		Toogood, Novello v.	554
		Travers, Hodgkinson and Others, Assignees, v.	257
		Trent and Mersey Navigation Company, Rex v.	545
		V	
		Vyvyan v. Arthur	410
			Wad-

TABLE OF CASES REPORTED.

xi

	Page		Page
Waddington, Rex v.	26	Willis, Clay and Others, Ad- ministrators, v.	864
Ward v. Levi	288	Wilmore and Page, Earl of Bristol v.	514
Warre, Bunter v.	689	Wilson, Bushworth, Gent. v.	267
Warter and Others v. Hut- chinson and Others	721	Willyams, Humphrey, Rex v.	609
Watkins, Flanagan v.	316	Whitchurch, Inhabitants of, Rex v.	574
Weir and Others, Rex v.	288	Winstone and Another v. Linn	460
Welsh, Fowle, Executor of Woodman, v.	29	Wood, Jackson v.	270
West v. Andrews	77	Woodman and Others, Pres- tidge v.	12
Wilkins, Holbrow and An- other v.	10	Woolley, Executrix, v. Kelly and Others	63
Wilkinson, Gent., one, &c. v. Diggell	158		
Williamson v. Johnson	146		

1945

RECEIVED
JAN 10 1945
U.S. DEPT. OF AGRICULTURE
WASHINGTON, D.C.

C A S E S

ARGUED AND DETERMINED

1822.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Third Year of the Reign of GEORGE IV.

LORYMER against SMITH.

Friday,
November 8th.

ASSUMPSIT for not accepting two parcels of wheat, one containing 700, the other 1400 bushels. Plea, general issue. At the trial before *Bayley J.* at the last Summer assizes for *Gloucester*, it was proved that on the 11th of *September*, 1821, a contract for the wheat was made between the parties at *Bristol*, and bought and sold notes were exchanged. They were in the following terms, "Bought of *James Lorymer*, 700 bushels of wheat, 1400 ditto, ditto, at 9s. 6d. per bushel, according to samples, banker's bill if required." By the usage of the place the buyer had a right to inspect the wheat in bulk. On the 19th of *September* the defendant went to the plaintiff's warehouse and desired to see the wheat; the parcel

The buyer of a parcel of wheat, by sample, has a right to inspect the whole in bulk, at any proper and convenient time; and if the seller refuses to shew it, the buyer may rescind the contract.

B

contain-

1822.

—
LORTIMER
against
SMITH.

containing 700 bushels was shewn to him, but the remaining 1400 bushels were not in the plaintiff's warehouse. Plaintiff offered to send a load to the defendant for his inspection, or to send for a bushel at that time, but declined shewing the whole, saying that he did not choose to let defendant into his connexions. The latter replied, that under those circumstances he would not have the wheat; a banker's bill was not at that time tendered or demanded. A few days afterwards defendant having sent to the plaintiff respecting some oats, the latter informed the messenger that the 1400 bushels of wheat were then in his lofts, and might be inspected; and that the whole was ready, and would be delivered upon banker's bills being given for the price. The learned Judge thought that the plaintiff had put an end to the contract, by refusing to shew the wheat in bulk when requested to do so on the 19th of *September*, and by his direction a verdict was found for the defendant. And now,

W. E. Taunton moved for a new trial, and contended, that the plaintiff did not put an end to the contract by refusing to shew the wheat in bulk on the 19th of *September*, for the defendant did not at that time tender a banker's bill for the price, nor demand to have the wheat delivered; and before he had done either of those things, the plaintiff offered to shew the wheat to the defendant's agent, when he called respecting the oats.

ABBOTT C. J. It appears that, by the usage of the place, the buyer had a right to inspect the wheat in bulk; which is so reasonable, that, without any such usage, the law would give him that right. Here, on the 19th of *September*, the buyer desired to see the whole of the wheat in bulk, but the seller refused to shew it; upon that

that refusal, the request having been made at a proper and convenient time, the buyer was entitled to rescind the contract. If this were not so, a man might bargain to deliver corn not then in his possession, and rely upon making a future purchase in time to fulfil his undertaking; but that is a mode of dealing not to be encouraged.

1822.

LOVYNER
against
BAYLEY,

BAYLEY J. I am of the same opinion.

HOLBOYD J. The buyer had a right to inspect the wheat in bulk, in order to ascertain whether it corresponded with the sample, and might have insisted upon having it delivered immediately upon tendering a banker's bill for the price. The seller not being ready to complete his part of the contract on the 19th of September, when he was requested to shew the wheat, cannot afterwards insist upon performance by the buyer.

BEST J. concurred.

Rule refused.

DYER *against* ASHTON.

Friday,
November 8th.

THE second count of the declaration stated, that in consideration that the defendant at his special instance and request, had become tenant of certain premises, as tenant from year to year, to the plaintiff, at a certain rent payable at the times therein mentioned the defendant undertook, &c. to keep the premises in repair during the tenancy, and pay the rent on the days specified in that behalf; breach—first, that the defendant did not keep the premises in repair, and 2ndly, that he

Where two breaches were assigned in one count of a declaration, upon a contract, and the defendant paid money into court upon one of them: Held, that he thereby admitted the whole contract as set out in that count.

1822.

Dyer
against
Ashton.

did not pay the rent. Defendant pleaded the general issue, and paid money into court on the second breach, for non-payment of rent. At the trial before *Richards* C. B. at the last Summer assizes at *Guildford*, the plaintiff proved the payment of money into court, and that the premises were out of repair; but did not prove that any contract had been made between himself and the defendant. The Lord Chief Baron thought that the payment of money into court upon the second count, admitted the contract as there stated, and the plaintiff accordingly had a verdict for 88*l.* on the first breach. And now,

Taddy, Serjt. moved for a new trial. It must be conceded, that where money is paid into court generally upon any count of a declaration, the contract stated in that count is thereby admitted, *Cox v. Brain* (a), *Melish v. Allnutt* (b), *Stoveld v. Brewin* (c). But this case is very distinguishable from those, for here the payment is, by the rule of court, limited to the second breach in the second count; the admission, therefore, does not extend beyond that breach.

Per Curiam. The effect of all the cases upon this subject is, that payment of money into court admits every thing which the plaintiff would be obliged to prove, in order to recover that money. Now in the present case, the plaintiff could not upon the second count of his declaration, have recovered the money paid in, without proving the contract as there stated; that contract was therefore admitted, and the plaintiff was entitled to a verdict for the amount which he proved.

Rule refused.

(a) 5 *Tampt.* 95. (b) 2 *M. & S.* 106. (c) 2 *B. & A.* 116.

1822.

MOORE, Assignee of W. BARTHROP the elder
and W. BARTHROP the younger, Bankrupts,
against J. BARTHROP.

Friday,
November 8th.

TROVER for goods, bills of exchange, &c. Plea, general issue. At the trial before *Holroyd J.* at the last Summer assizes for *Lincoln*, these facts were proved. The bankrupts carried on the business of wool-merchants in partnership, *W. Barthrop* the elder residing at *Lincoln*, and *W. Barthrop* the younger at *Bradford* in *Yorkshire*. On the 15th of *June*, 1821, the bankrupts were indebted to *Ellison, Moore, and Co.*, bankers at *Lincoln*, in the sum of 1300*l.* who refused to give them any further credit until that balance was liquidated. In order to effect this, application was made to the defendant, who agreed to advance 200*l.* for that purpose, and accordingly drew a cheque on his banker for that sum, and delivered it to *W. Barthrop* the son, on the 18th of *June*. On the 20th of *June*, *W. Barthrop* the father committed an act of bankruptcy, and on the evening of the same day received a letter from his son, containing the cheque in question, together with several bills of exchange, which the son had collected in payment of outstanding debts. *W. Barthrop* the father did not open this letter, but carried it back the same night to his son's house at *Bradford*; and on the following day the cheque, all the bills, and goods to a considerable amount, were delivered over to the defendant, in payment of a debt due to him. A short time after-

Where the defendant having agreed to lend to two persons, who afterwards became bankrupts, 200*l.*, to be applied to a specific purpose, drew a cheque on his banker for that sum, and delivered it to them before their bankruptcy; and they not having used the cheque, returned it to the lender after having committed an act of bankruptcy: Held, that their assignee could not maintain trover for the cheque.

1822.

 MOORE
 against
 BARTHOLO.

wards, *W. Barthrop* the younger committed an act of bankruptcy, and a joint commission was issued against him and his father, under which the plaintiff was chosen sole assignee. Under these circumstances the learned Judge thought that the plaintiff was not entitled to recover the amount of the cheque, and the jury accordingly found a verdict for the plaintiff for 1016*l.*, being the value of the remainder of the property delivered over to the defendant. And now,

Vaughan Serjt. moved to add 200*l.* to the damages found, and contended, that the defendant intended to give the bankrupts a general control over the cheque; the restoration of it to the drawer was therefore a fraudulent preference, and entitled the plaintiff to recover the amount in this action. But,

Per Curiam. This was a draft upon the defendant's banker, and not money, and the evidence shews that it was given for the specific purpose of being paid into the bank of *Ellison, Moore, and Co.* in reduction of the balance due to them from the bankrupts. Now if a cheque be placed, for a specific purpose, in the hands of a person who gives no value for it, and that person becomes bankrupt before he has used the cheque; if the drawer gives his banker orders not to pay the money, the assignees of the bankrupt cannot maintain an action to recover it. The bankrupt certainly could not, do so, and his assignees must, in this respect, stand in the same situation; the direction of the learned Judge was therefore right, and the damages ought not to be increased.

Rule refused.

1822.

HOFFMAN and Another *against* HEYMAN.Friday,
November 8th.

ASSUMPSIT by vendor against vendee upon a special contract for the sale of tobacco. Plea, general issue. At the trial before *Abbott C. J.* at the *London* sittings, after last *Trinity* term, it appeared that the plaintiffs, in the month of *July*, 1820, sold to the defendant a quantity of tobacco under the following contract: “Bought of Messrs. *W. and J. Hoffman*, for account of Messrs. *Heyman, Welt, and Co.*, about 641 hhds. of tobacco, being the cargo of the *Ulysses*, from *George Town, America*, and now on her voyage to *Bremen*, at 58s. 6d. per cwt. manifest weight, payable one-fifth in money on or before *Sunday, 6th of August*, and for the other four-fifths the sellers are to look to their correspondents, Messrs. *Delius of Bremen*, to whom the property goes consigned. It is nevertheless understood between the parties, that interest is to be calculated as if the sale was made at two months from final delivery. The buyers to have the benefit of the sellers’ policy in case of average.” The defendant paid one-fifth of the price at the time specified; and the consignees duly accounted to the plaintiffs for the whole of the proceeds of the cargo when sold at *Bremen*; but those proceeds fell considerably short of the remaining four-fifths of the price at which the tobacco was sold to the defendant. Under these circumstances, the jury, by the direction of the Lord Chief Justice, found a verdict for the Plaintiffs for 3000*l.*, the amount of the deficiency. And now,

Where the defendant bought of the plaintiffs a quantity of tobacco, upon a contract to pay one-fifth of the price at a day specified, and that the seller should look to his agent abroad, to whom the tobacco was consigned, for the remainder; the tobacco having been sold by the consignee at a considerable loss, the buyer was held liable for the difference between the proceeds and the four-fifths of the price stated in the contract, which remained unpaid.

1822.

HOFFMAN
against
HEYMAN:

Marryat moved for a new trial, and contended that, by the terms of the contract, the defendant, who had paid one-fifth of the price, was not to be further responsible. Here the plaintiffs were to look to their consignees for the remaining four-fifths, and if a loss was incurred on the sale at *Bremen*, it must fall upon the vendors, and not on the defendant.

Per Curiam. By the language used in the first part of the contract, this appears to be a common sale of a quantity of tobacco, at a price specified. The subsequent part of it might, perhaps, have made the sellers responsible, in case of the failure of their consignees at *Bremen*, for all the proceeds which came to the hands of the latter; but, at all events, the defendant must be liable for the excess of the price stated in the contract, beyond the fifth, which he has already paid, and the amount of the proceeds of the goods when sold at *Bremen*. The verdict is therefore right.

Rule refused.

Saturday,
November 9th.

PROUD *against* HOLLIS.

A plea of a right of way, stated a surrende. to defendant of a copyhold with all ways, then used by the tenants and occupiers thereof; that defendant

was admitted and continued seised, and being so seised, and having occasion to use the way, committed the trespass. New assignment that defendant used the way for other purposes, &c. Held, that the defendant, being landlord, had a right, while the copyhold was in the occupation of the tenant, to use the way to remove an obstruction; and that the words of the plea were sufficiently large to comprehend all the purposes for which a person seised might lawfully use the way.

TRESPASS for breaking and entering plaintiff's close on different days and times. Plea, that on the 21st *September*, 1808, a copyhold tenement was surrendered to defendant, with all ways then used by the tenants and occupiers of the said tenement; that the sur-

renderor

renderor was then seised in fee, of the locus in quo, according to the custom of the manor, and that a way was then used by the tenants and occupiers of the surrendered tenement, from thence over the locus in quo to a public street; that the defendant was admitted, and continued seised, and *being so seised*, and having occasion to use the way, he committed the supposed trespasses. Replication traversed the way being used at the time of the surrender; and there was a new assignment that defendant at other times, and on other occasions, and for other purposes than those mentioned in the plea, trespassed on the close. Plea to new assignment, not guilty. At the trial, the right of way was established, but it appeared that when the trespass was committed, the tenement in respect of which the way was claimed, was in possession of a tenant, and that the defendant, as landlord, went over the locus in quo to assert a right to the way, which had been obstructed. There was a verdict for the defendant generally, with leave to move to enter a verdict on the new assignment for the plaintiff, with 1s. damages.

Campbell now moved accordingly. There is no authority to shew that the landlord of a tenement, to which a right of way is appurtenant, may, while it is in the occupation of a tenant, lawfully use the way to remove an obstruction, and to assert the right of way, or for any other purpose. Therefore, non-user of the way during the lease would be no bar to the landlord's right to the way when the lease expires. But supposing that a landlord has the right contended for, this is not the right which he alleges that he exercised in his plea. The words "*being so seised, and having occasion to use the said way,*" must mean that he was then possessed of the tenement,

1822.

 PROUD
 against
 HOLLES.

1852.

Plaintiffs
against
Defendants

tenement, and that he used the way for the ordinary purposes of an occupier in passing over the locus in quo in going to and from the tenement. But, in fact, he was not the occupier, but landlord, at the time he used the way, and he used it for the purpose of asserting his right in that character. The occasion on which he used it therefore is different from that alleged in the plea; and the new assignment is supported. But,

Per Curiam. While the tenement is occupied by a tenant, the landlord may use the way to view waste, or demand rent, or to remove an obstruction; the language of the plea comprehends all the purposes for which a person seised of the tenement may lawfully use the way; the new assignment meant that the defendant had trespassed on the close for some purpose unconnected with the use of the way claimed in the plea, and the defendant is therefore entitled to a general verdict on the whole record.

Rule refused.

Saturday,
November 9th.

HOLBROW and Another against WILKINS.

The plaintiffs sold goods to C. and P., and took their acceptance for the amount, half of which was guaranteed by the defendant. Before the bill became due, C. and P.

ASSUMPSIT on a guaranty. Plea, general issue.

At the trial before *Abbott C. J.* at the *London* sittings after last *Trinity* term, the following facts appeared. The plaintiffs were merchants residing at *Stroud* in *Gloucestershire*. The defendant was a commission-broker in the city of *London*. In the month of

became insolvent, of which the defendant was then informed, and also that the plaintiffs looked to him for the sum which he had guaranteed: Held, that, under these circumstances, it was unnecessary for the plaintiffs to present the bill when due, or give the defendant notice of the non-payment of it.

February,

February, 1818, the latter sold wools for the plaintiffs to Messrs. *Carver* and *Peat*, to the value of 112*l.* 12*s.* for which they accepted a bill payable at eight months, and the defendant agreed to guarantee half the amount for an allowance of 1*l.* per cent. The bill became due on the 29th of October, 1818. About the 4th of September in the same year, *Carver* and *Peat* became insolvent, and on the 22d of that month the plaintiffs wrote to the defendant requesting him to accept a bill at one month for the sum guaranteed by him, which he refused to do. The bill accepted by *Carver* and *Peat* was not presented when due, nor was any notice of the non-payment given to the defendant. The bill would not have been paid if presented, and it did not appear that the defendant sustained any damage by reason of the want of presentment and notice. A verdict was found for the plaintiffs, which

1822.

Heagrow
against
Wilkins.

Denman now moved to set aside and enter a nonsuit, According to *Phillips v. Astling (a)*, where a guaranty is given for the price of goods which are to be paid for by bill, due notice of the dishonour must be given to the surety; and the present case is distinguishable from *Murray v. King (b)*, which was an action on a bond. And to have held the want of notice a sufficient plea, in that case, would have been adding a new term to the condition of the bond.

ABBOTT C. J. The case of *Phillips v. Astling* differs very materially from this. The insolvency in that case did not happen until after the bill became due.

(a) 2 Taunt. 206.

(b) 5 B. & A. 165.

1822. In the present instance, so early as the 22d of *September*, the defendant had notice that *Carver* and *Peat* were insolvent, and that the plaintiffs would look to him for payment.

HOLBROW
against
WILKINS.

BAYLEY J. Here the defendant was not a party to the bill; the case of *Swinyard v. Bowes* (a) is, therefore, precisely in point against him.

HOLROYD and BEST Justices, concurred.

Rule refused.

(a) 5 M. & S. 62.

Saturday,
November 9th.

PRESTIDGE *against* WOODMAN, Esq. and Others.

Where a magistrate acts upon a subject matter of complaint, over which he has authority, but which arises out of his jurisdiction, he is entitled to notice of action under 24 G. 2. c. 44. s. 1.

ACTION for false imprisonment. Plea, not guilty.

At the trial before *Garrow* B. at the last Summer assizes for *Oxfordshire*, it appeared, that in the month of *August*, 1820, the defendant, *Woodman*, a magistrate of the borough of *Chipping Norton* in that county, issued a warrant in pursuance of the statute 1 G. 4. c. 56., for the commitment of the plaintiff to the house of correction for that county, for wilfully damaging a wall; and that, in obedience to the warrant, the other defendants, officers of the same borough, conveyed the plaintiff to the house of correction. There was no proof that any notice of action had been given to the defendant *Woodman*, as required by 24 G. 2. c. 44. s. 1., and the plaintiff was thereupon nonsuited.

Jervis

Jervis now moved to set aside the nonsuit, upon affidavits, stating that the wall damaged by the plaintiff was not within the borough of *Chipping Norton*, and contended, that the magistrate was acting out of his jurisdiction, and consequently, was not entitled to notice under 24 G. 2. c. 44. s. 1., and for this he cited *Blatcher v. Kemp*. (a)

1822.

PRESTIDGE
against
WOODMAN.

Per Curiam. That case is very different from the present; that was the case of a constable, this of a magistrate. A constable is not protected, unless he acts in obedience to a warrant; but a magistrate is protected in all cases where he acts in execution of his office. The distinction between the magistrate and the officer, in this respect, is settled in the case of *Money v. Leach*. (b) In the case of *Weller v. Toke* (c) it was held, that where one magistrate had acted alone, in a matter which required the concurrence of two, still he was acting in execution of his office, and was entitled to notice, under the 24 G. 2. c. 44. s. 1. Here the magistrate had authority to act upon the subject matter of the complaint brought before him, and must, therefore, be considered to have acted by virtue of his office, although the place where the offence was committed was not within his jurisdiction.

Rule refused.

(a) 1 H. Bl. 15. n.

(b) 3 Burr. 1742.

(c) 9 East, 564.

1822.

PRING *against* CLARKSON.

A bill of exchange having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first. The payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff: Held, that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill so as to exonerate the drawer.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange. Plea, general issue. At the trial before Abbott C. J. at the sittings at *Westminster* in *Trinity* term, it appeared, that the bill in question was drawn by the defendant, for 85*l.* 8*s.* 7*d.*, in favour of Messrs. *Geddin* and Son, and directed to *J. Thompson*, *Long-acre*, by whom it was duly accepted. *Geddin* and Son negotiated the bill, and when it became due, the bankers at *Abingdon*, with whom it had been discounted, were the holders; it was then presented for payment and dishonoured, whereof due notice was given to the drawer. *Thompson*, the acceptor, afterwards sent another bill for 126*l.* to *Geddin* and Son, by letter, but had not any communication with them respecting the first bill. *Geddin* and Son discounted the second bill also with the bankers at *Abingdon*, who returned to them the first bill, together with the difference between the two. The first bill was afterwards indorsed to the plaintiff by *Geddin* and Son for a valuable consideration. It was contended at the trial, that *Geddin* and Son, by taking a new bill, not then due, must be considered as having given time to the acceptor, and discharged the drawer of the original bill. The Lord Chief Justice overruled the objection, but reserved liberty to the defendant to move to enter a nonsuit. A verdict having been found for the plaintiff, *Chitty*, in *Trinity* term, obtained a rule for that purpose, against which

Puller

Puller (with whom was *Platt*) now shewed cause. The second bill was merely a collateral security, for there was not any communication between *Geddin* and Son and *Thompson*, as to giving time for payment of the original bill. The case of *Gould v. Robson* (a) is distinguishable from the present; for there part payment was received, and also a new bill, and an agreement was entered into, that the holder should keep the original bill until the second was paid; and Lord *Ellenborough* considered it as an agreement, that the original bill should not be enforced in the mean time. The case of *Claridge v. Dalton* (b) is not applicable. He was then stopped by the Court.

1822.

PAING
against
CLARESON.

Chitty, contra. The new bill transmitted by *Thompson* to *Geddin* and Son was a valuable consideration, by the receipt of which their right of action on the original bill was suspended. In *Kearslake v. Morgan* (c) it was held a good plea in assumpsit, that the defendant had indorsed a promissory note to the plaintiff, "for and on account of the debt." So here, unless *Geddin* and Son could have shewn, that they had been induced by fraud to receive the second bill, they could not have sued *Thompson* upon his original acceptance.

ABBOTT C. J. It is always best for the Court to rely upon some broad plain rule. In cases of this description, the rule laid down is, that if time be given to the acceptor, the other parties to the bill are discharged; but in no case has it been said that taking a collateral security from the acceptor shall have that

(a) 8 East, 576.

(b) 4 M. & S. 226.

(c) 5 T. R. 513.

effect.

1822.

PRING
against
CLARKSON.

effect. Here the second bill was nothing more than a collateral security. This rule must, therefore, be discharged.

Rule discharged.

Monday,
November 11th.

SPROWLE *against* LEGGE.

Declaration stated, that the defendant at *Dublin*, made a promissory note and thereby promised to pay the same at *Dublin*, without alleging it to be at *Dublin* in *Ireland*.

Held, that upon this declaration the promissory note must be taken to have been drawn in *England*, for *English* money, and therefore that proof of a note made and payable at *Dublin* in *Ireland*, for the same sum in *Irish* money did not support the declaration.

DECLARATION stated that the defendant on, &c. at *Dublin* to wit, at *London*, &c. made his certain promissory note, and thereby promised to pay at No. 81, *Dame-street, Dublin*, forty-one days after date, to the plaintiff or order, 171*l.* 17*s.* 6*d.* sterling. It then averred the presentment for payment at No. 81, *Dame-street, Dublin*, &c. &c. The declaration contained the usual money counts. The defendant pleaded the general issue to the count upon the note, and suffered judgment by default as to the other counts. At the trial before *Abbott C. J.* at the *London* sittings after last *Trinity* term, it appeared that the note was made at *Dublin* in *Ireland*, and it was objected on the part of the defendant, that it must be taken from the statement in the declaration that the note was drawn in *England* for *English* money, whereas the proof was, that it was drawn in *Ireland* for *Irish* money. A witness stated that, in *Ireland*, *Irish* currency is called sterling. The case of *Kearney v. King (a)* was cited, and *Abbott C. J.*, upon the authority of that case, directed the jury to find a verdict for the defendant upon the count on the note, reserving liberty to the plaintiff to move to enter a

(a) 2 B. & A. 301.

verdict

verdict for the amount due. The damages on the other counts were assessed at a sum, including the value of the money mentioned in the note in *English* currency, without interest.

1822.

SNOWLE
against
LEACH.

Campbell now moved, according to the leave reserved, and contended that this case was distinguishable from *Kearney v. King*, because the note was payable, as well as drawn, in *Ireland*. Any common person reading the declaration would infer that the note was made at *Dublin* in *Ireland*, and the Court must put the same construction upon it. Judges are bound to take judicial notice of the division of the realm into counties, *Deybel's* case. (a) They do not, therefore, require to be informed by express allegation that *Dublin* is in *Ireland*. *Dublin* is mentioned in many public acts of parliament; and although *Dublin* in *Ireland* is meant, the legislature has thought it sufficient to call the place *Dublin*, without addition or description. If a note, purporting to be made in *Lombard-street* in the city of *London*, were declared upon in an *Irish* court, the judges there would hardly require an allegation that *London* is in *England*. There may, by possibility, be a town in *England* called *Dublin*, with a street called *Dame-street*; but the Court, in ignorance of any other *Dublin*, will intend that the *Dublin* here spoken of is *Dublin* in *Ireland*, of which they are not permitted to be ignorant. Assuming this, the objection respecting the currency seems to be removed. The note being alleged to be made in *Ireland*, and to be payable in *Ireland*, the fair inference is, that the money mentioned in it is the currency of the country in which it is made, and in which it is payable. The statement in the declaration,

(a) 4 B. & A. 246.

1822.

BROWN
against
LEASE.

therefore, that the defendant, by the note, promised to pay 171*l.* 17*s.* 6*d.* is substantiated by proof of a promise to pay so much in *Ireland* in *Irish* currency.

Per Curiam. It is unnecessary to decide, whether, upon the face of the declaration, the note must be taken to have been made in *Ireland*, and to be payable there; for the other objection is clearly fatal, viz. that the money is not stated in the declaration to be *Irish* currency. In *Ireland* there may be a contract to pay a certain sum in *English* money. Now, in pleading it is usual to state the legal effect of an instrument; and therefore, when in an *English* court an instrument is described as containing a promise to pay a sum generally in pounds, shillings, and pence, *English* money must be understood; so that if the instrument in reality promises to pay this sum in *Irish* currency, there is a fatal variance.

Rule refused.

In the Court of Common Pleas, Michaelmas Term, 1822.

Tuesday,
November 12th.

BOONE against MITCHELL.

Declarations, in consideration that plaintiff would procure A. B. to grant a lease to defendant; the latter promised to pay the plaintiff 170*l.* The

THIS was an action of assumpsit. The first count of the declaration stated that, in consideration that the plaintiff, at the request of defendant, would procure the governors of a certain charity to grant a lease to the defendant, the defendant undertook to pay the plaintiff 170*l.* The proof was, that A. B. having agreed to grant a lease to the plaintiff, the latter undertook, originally, to assign it to defendant, for the consideration mentioned; but that afterwards, a lease, to which plaintiff was a party and assented, was granted immediately by A. B. to the defendant. The consideration to be paid by the defendant to the plaintiff was not mentioned in that lease: Held, first, that the lease was not void on account of this omission, the ad valorem duty imposed by the 50 G. 3. c. 184., applying only to considerations passing between lessor and lessee; and, secondly, that the evidence proved the substitution of a new contract to procure a lease from A. B. to the defendant, in lieu of the original contract, and that there was not any variance.

the

the plaintiff a certain sum, to wit, 170*l.*; it then averred that the lease was procured, and stated a breach in non-payment.

1822.

 BOONE
 against
 MITCHELL.

At the trial before *Abbott C. J.*, at the *London* sittings after last term, it appeared that the plaintiff, having an agreement for a lease from the governors of the charity, contracted with the plaintiff in writing, in consideration of 170*l.*, to assign the lease to him, the defendant, when it should be obtained. The defendant paid part of the money, and was let into possession by the plaintiff, who was already in the occupation of the premises; afterwards the lease, instead of being granted to the plaintiff, and being by him assigned to the defendant, was, by the consent of the plaintiff, granted directly by the governors to the defendant. The plaintiff was a party to the lease, and testified his assent in consideration of the defendant covenanting to perform the covenants, omitting to notice any pecuniary consideration. It was objected by the defendant's counsel, that the contract declared upon (to procure a lease) varied from the contract proved in evidence, which was to assign a lease; but the Chief Justice reserved the point, and the plaintiff had a verdict.

F. Pollock moved to enter a nonsuit on two grounds; first, that the contract stated in the declaration being to procure a lease for 170*l.*, and the contract proved in evidence being to assign a lease, there was a variance; and there was a wide difference between the situation of a direct lessee, who would always be liable on the covenants, and an assignee, whose liability would be at an end on his parting with the term; and if the lease itself was resorted to, in order to shew that the defendant was

1822.

Boone
against
MITCHELL.

contented to take the lease to be granted to himself instead of having an assignment, then, he contended, a second objection was raised on the stamp act, 55 G. 3. c. 184., by which a stamp is imposed according to the consideration given for the lease, and also according to the rent reserved. Here the legal estate was in the governors, and they having agreed to grant a lease to the plaintiff, he had an equitable interest; and both parties concurring, (the governors in consideration of the rent, and the plaintiff in consideration of the 170*l.*,) a lease was granted to the defendant; which lease, having no stamp in respect of the consideration of 170*l.* to the plaintiff, and no such consideration being stated on the face of it, was void.

Per Curiam. The stamp act requiring the consideration to be set out, and imposing an ad valorem duty on the consideration, applies only to the case of a consideration passing between the lessor and the lessee. The legislature never could have intended the lease to be void by the lessor's omitting to state a consideration which he might not, and perhaps could not, be aware of. As to the other point, there is sufficient evidence of a substitution of a contract for procurement of a lease, instead of an assignment of one, to sustain the declaration as framed; and the plaintiff is therefore entitled to the verdict which he obtained.

Rule refused.

1822.

The KING *against* KIRK.*Wednesday,
November 15th.*

AN order of two justices for the county of *Denbigh*, made at a special sessions held on the 7th of *June*, 1821, recited that they had found, upon view, that a certain part of a highway therein particularly described, by reference to a plan annexed to the order, might be diverted and turned, so as to make the same nearer and more commodious to the public; and that they had viewed a course in lieu thereof, therein also particularly described, by reference to the same plan, part of which new road was to pass through the lands and grounds of the late *Thomas Jones*, Esq. The order then stated that they had received evidence of the consent of the said *T. Jones*, Esq., in his lifetime, to the said part of the new road being made and continued through his lands, by writing under his hand and seal; and directed the road to be diverted and turned accordingly. The sessions, on appeal, having confirmed this order, it was removed into this court by certiorari, and a rule nisi had been obtained for quashing it, and the order of sessions confirming it; against which

An order of justices for diverting a highway stated that the new road was to pass through the lands of the late *T. J.*, and that the justices had received evidence of the consent of the said *T. J.* in his lifetime: Held, that this order was bad, because it did not thereby appear that *T. J.* was the owner of the estate at the time when the order was made.

Marryat now shewed cause. By 55 G. 3. c. 68. s. 2. it is enacted, that when it shall appear, upon the view of two justices, that any public highway may be diverted so as to make the same nearer or more commodious to the public, and the owner of the lands through which such new highway so proposed to be made shall consent thereto, by writing under his hand and seal, it shall be lawful for the justices to divert such highway, and by

1822.

**The King
against
Kirk.**

such means, and subject to such exceptions and conditions as are contained in the 13 G. 3. c. 78. Now, by the 70th section of the latter statute, the justices are bound to pursue the form given in the schedule thereto. *Davison v. Gill.* (a) The order in this case is copied from the form given in the schedule to that statute; and the question is, whether it sufficiently appears, on the face of it, that the consent of the owner of the lands, through which the new road was to pass, was obtained. Now every intendment ought to be made in favour of the order. It clearly appears that the consent of *T. Jones*, who had been the owner, was obtained; and once given, it could not be revoked. It was binding upon any person to whom the lands afterwards came. If this were not so, it would be most inconvenient; for it would be competent to a subsequent purchaser of the estate to revoke the consent given by the former owner, even after all the expence of making the new road had been incurred: besides, by 55 G. 3. c. 68. s. 3. the sessions are authorised finally to determine the appeal; and they have confirmed the order. (b)

ABBOTT C. J. I am of opinion that this order must be quashed. It seems to me that the proper construction of the statute will be, to hold that there must be a consent of the person who is the owner of the estate at the time when the order is made. Now, here it does not appear, upon the face of the order, that the person whose consent was obtained was alive, either at the time when the order was made, or at any time after the

(a) 1 *East*, 64.

(b) But see *Rex v. Sheppard*, 3 B. & A. 417., where it is held, that, notwithstanding this, the certiorari is not taken away.

proceedings had commenced; for it is not stated whether the consent was given before or after the justices had made their view. Our present decision will not affect the question, whether the owner of an estate may revoke a consent given by a former owner who was alive, and consenting at the time the order was made; we only decide, that it must appear on the face of the order that the consent of the person who is the owner at the time when the order is made, has been obtained.

1822.

The KING
against
KING.

Order of sessions quashed.

The KING *against* The Inhabitants of ALL
SAINTS, CAMBRIDGE.

Wednesday,
November 13th.

TWO justices removed *Lydia Fowler* from the parish of the *Holy Trinity* to the parish of *All Saints, Cambridge*.

The sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case. The pauper's maiden settlement was in *All Saints'* parish. In 1793 she married *William Fowler*, a maker of chair-bottoms and mats; and the question was, whether he had any legal settlement. The following were the circumstances as to that point. In 1807 he hired a house in the parish of *St. Peter's, Cambridge*, of the value of 9*l.* 10*s.* per annum, and resided therein with his family above a year; during the same time he had two separate parol contracts for two ponds, or for the rushes and flags growing therein, upon these terms: one of the ponds was of the extent of three acres, in which he was to have the exclusive right of cutting the rushes and flags at his pleasure, but not of draining off the

Where a pauper resided for a year in a house in the parish of *A.*, and during all that time had two subsisting parol contracts for two ponds, or the rushes and flags growing therein, which he was to have the exclusive right of cutting at his pleasure: Held, that these were a sufficient tenement (being together above the value of 10*l.* per annum) to confer a settlement in *A.*

1822.

—
The King
against
The Inhabit-
ants of
ALL SAINTS,
CAMBRIDGE.

water; the owner had the right to use the water, or to drain it off, as he thought proper. For this *W. F.* was to pay 5s. a year to the occupier of the farm in which it was situated. The pond was not fenced off from the rest of the field, and the occupier's cattle, when depasturing there, used the pond for drinking at; but the rushes and flags were not such herbs as cattle would eat. The other pond was only about a quarter of an acre, and was occupied under similar circumstances, at the yearly rent of 5s., and two door-mats of the value of 2s. The next year *W. F.* agreed to pay 10s. for the same, but died before the rushes were all gathered. The contracts for the ponds subsisted during all the time that *W. F.* occupied the house in the parish of *St. Peter's*. The sessions thought this was not sufficient to establish a settlement in that parish, and confirmed the the original order.

Starkie, in support of the order of sessions. This was a personal contract for the rushes, and not a tenement. The pauper's husband took no interest in the soil, but had a mere privilege of going upon the land to cut the rushes which he had bought. In *Pincomb v. Thomas (a)*, it was held that the soil was not reserved out of a lease, by an exception of saleable growing woods; so, in *Warwick v. Bruce (b)*, it was held that no interest in the soil passed by a sale of growing potatoes. And in the case of *Rex v. Old Alresford (c)*, where the question was, whether the pauper gained a settlement by renting the fishery of a pond, with the spear, sedge, flags, and rushes growing in and about the same, at 10*l.* per annum, the

(a) *Cru. Jac.* 524.(b) 2 *M. & S.* 205.(c) 1 *T. R.* 358.

Court decided, that the soil passed with the fishery ; but the sedge, &c. was not relied upon, as passing the soil, either by the counsel or the Court. The cases of *Rex v. Whisley* (a) and *Rex v. Stoke* (b), proceeded on the ground, that the grass being the whole produce of the land, by a grant of that an interest in the soil passed. But even admitting this to have been a tenement, still the pauper's husband did not occupy, for 40 days, a tenement of the value of 10*l.* per annum ; for it must be presumed, that he began to cut the rushes immediately after taking the ponds : the value of the tenement would therefore decrease de die in diem. *Rex v. Bowness*. (c)

1822.

The King
against
The Inhabit-
ants of
ALL SAINTS,
CAMBRIDGE.

Tindal and *Storks*, contra, were stopped by the Court.

Per Curiam. There is no valid distinction between a lease of grass and one of rushes growing upon the land. This case is therefore similar to that of *Rex v. Stoke*. If this had been a bargain for any thing in a state to be severed, as in *Warwick v. Bruce*, it would have been a personal contract ; but here, the pauper's husband had a right to all the rushes which might grow in the ponds during the year. That gave him a continuing interest in the soil for the whole year ; and by renting those ponds, together with the house in the parish of *St. Peter's*, he held a tenement of a greater value than 10*l.* per annum. It is found as a fact, that he resided in that house for more than a year ; he therefore gained a settlement in that parish. The con-

(a) 1 *T. R.* 137.(b) 2 *T. R.* 451.(c) 4 *M. & S.* 210.

1822.

The King
against
The Inhabit-
ants of
ALL SAINTS,
CAMBRIDGE.

sequence is, that the pauper was improperly removed to the parish of *All Saints*; and that both the orders must be quashed.

Both orders quashed.

Thursday,
November 14th.

The KING against WADDINGTON.

A publication stating *Jesus Christ* to be an impostor and a murderer in principle, is a libel at common law. Semble, that the 53 G. 3. c. 160. does not alter the common law, but only removes the penalties imposed upon persons denying the Trinity, by 9 and 10 W. 3. c. 32., and extends to such persons the benefits conferred upon all other Protestant dissenters, by 1 W. 4. M. 2. 1. c. 18.,

THIS was an information by the Attorney-General against the defendant for a blasphemous libel. The effect of the libel set out in the information was to impugn the authenticity of the Scriptures; and one part of it stated that *Jesus Christ* was an impostor and a murderer in principle, and a fanatic. The defendant was tried at the *Middlesex* sittings after last *Trinity* term, and convicted. Before the verdict was pronounced, one of the jurymen asked the Lord Chief Justice, whether a work which denied the divinity of our Saviour was a libel. The Lord Chief Justice answered, that a work speaking of *Jesus Christ* in the language used in the publication in question was a libel; Christianity being a part of the law of the land. The defendant, in person, now moved for a new trial; and urged that the Lord Chief Justice had misdirected the jury, by stating that any publication in which the divinity of *Jesus Christ* was denied was an unlawful libel; and he argued, that since the 53 G. 3. c. 160. was passed, the denying one of the persons of the Trinity to be *God* was no offence; and, consequently, that a publication in support of such a position was not a libel.

ABBOTT

ABBOTT C. J. I told the jury, that any publication in which our Saviour was spoken of in the language used in the publication for which the defendant was prosecuted, was a libel. I have no doubt whatever that it is a libel to publish that our Saviour was an impostor and a murderer in principle.

1822.

The King
against
Waddington,

BAYLEY J. It appears to me, that the direction of my Lord Chief Justice was perfectly right. The 53 G. 3. c. 160. removes the penalties imposed by certain statutes referred to in the act, and leaves the common law as it stood before. There cannot be any doubt, that a work which does not merely deny the Godhead of *Jesus Christ*, but which states him to be an impostor and a murderer in principle, was, at common law, and still is, a libel.

HOLROYD J. I have no doubt whatever that any publication in which our Saviour is spoken of in the language used in the work which was the subject of this prosecution, is a libel. The direction of the Lord Chief Justice was therefore right in point of law; and there is no ground for a new trial.

BEST J. My Lord Chief Justice reports to us, that he told the jury that it was an indictable offence to speak of *Jesus Christ* in the manner that he is spoken of in the publication for which this defendant is indicted. It cannot admit of the least doubt that this direction was correct. The 53 G. 3. c. 160. has made no alteration in the common law relative to libel. If, previous to the passing of that statute, it would have been a libel to deny, in any printed work, the divinity of the second person in the Trinity, the same publication would be a libel now. The 53 G. 3. c. 160., as its title expresses,
is

1822.

—
The King
against
Waddington.

is an act to relieve persons who impugn the doctrine of the Trinity from certain penalties. If we look at the body of the act to see from what penalties such persons are relieved, we find that they are the penalties from which the 1 *W. & M. sess. 1. c. 18.* exempted all Protestant dissenters, except such as denied the Trinity, and the penalties or disabilities which the 9 and 10 *W. 3.* imposed on those who denied the Trinity. The 1 *W. & M. sess. 1. c. 18.* is, as it has been usually called, an act of toleration, or one which allows Dissenters to worship God in the mode that is agreeable to their religious opinions, and exempts them from punishment for non-attendance at the established church, and non-conformity to its rights. The legislature, in passing that act, only thought of easing the consciences of Dissenters, and not of allowing them to attempt to weaken the faith of the members of the church. The 9 and 10 *W. 3.* was to give security to the government, by rendering men incapable of office who entertained opinions hostile to the established religion. The only penalty imposed by that statute is exclusion from office; and that penalty is incurred by any manifestations of the dangerous opinion, without proof of intention in the person entertaining it either to induce others to be of that opinion, or in any manner to disturb persons of a different persuasion. This statute rested on the principle of the test laws, and did not interfere with the common law relative to blasphemous libels. It is not necessary for me to say, whether it be libellous to argue from the Scriptures against the divinity of *Christ*; that is not what the defendant professes to do. He argues against the divinity of *Christ*, by denying the truth of the Scriptures. A work containing such arguments, published maliciously (which the jury in this case have found)

found) is by the common law a libel; and the legislature has never altered this law, nor can it ever do so whilst the Christian religion is considered to be the basis of that law.

1822.

The King
against
Waddington.

Rule refused. (a)

(a) See *Rex v. Carlile*, 3 B. & A. 161., and *Attorney-General v. Pearson*, 3 M. & W. 352.

FOWLE, Executor of WOODMAN, &c. against
WELSH.

Friday,
November 15th.

COVENANT. The plaintiff declared, that, by a deed-poll of the 12th September, made in the lifetime of *W. Woodman*, plaintiff's testator, (reciting, amongst other things, that, in 1811, *T. B. White Parsons*, in consideration of 2800*l.*, by lease and release, granted, &c. to *Aaron Blandford*, in fee, certain premises therein described; and that the said *Aaron Blandford* having occasion for 2000*l.*, had borrowed that sum of the said *W. Woodman*, and, for securing repayment thereof, had, by lease and release, bearing date 10th and 11th September, 1812, granted, &c. the said premises to the said *W. Woodman*, his heirs and assigns, subject to a proviso for redemption :) "the said *Aaron Blandford* and the said defendant, for better securing the repayment of the said sum of 2000*l.* to the said *W. Woodman*, his executors, &c. did severally covenant, promise, and agree,

Covenant to save harmless certain premises against all actions, suits, claims, and demands whatsoever, both in law and equity, which might be made, commenced, or prosecuted by *H. W. P.*, or *T. B. W. P.* Breaches, 1st, That *H. W. P.* on, &c. at, &c., who then and there made a claim and demand, and claimed to have a right and title to the premises, entered and cut trees, &c., and procured the occupier to be torn to him.

2dly, That certain title-deeds relating to the premises were withheld by one *A. W.*, at the instance, and through the claim and demand of *T. B. W. P.* Plea to 1st breach, that *H. W. P.* had no lawful claim or title to the premises; to 2d breach, similar plea as to *T. B. W. P.* Demurrer and joinder: Held, first, that *H. W. P.* and *T. B. W. P.* being named in the covenant, the indemnity extended to all claims made by them, whether upon lawful title or otherwise; and, secondly, that the acts upon which the breaches were assigned were claims in law within the meaning of the covenant. Query, whether the breaches would have been good in form, if specially demurred to.

to

1822.

 FOWLE
 against
 WELSH.

to and with the said *W. Woodman*, his heirs, executors, &c. that for so long time as the said *W. Woodman*, his executors, &c. should continue the said sum of 2000*l.* out at interest on the said premises, they the said *Aaron Blandford* and the said defendant, their heirs, &c., and each of them, should and would save harmless and keep indemnified the said *W. Woodman*, his heirs, executors, &c. and also the said premises, of, from, and against *all actions, suits, claims, and demands whatsoever, both in law and equity*, which should or might be had, made, commenced, or prosecuted, by *T. W. Parsons*, *H. W. Parsons*, or *T. B. W. Parsons*, and of and from all costs, charges, and expenses which the said *W. Woodman*, his heirs, executors, &c. should sustain, by reason of such actions, suits, claims, and demands, or otherwise howsoever." The declaration then averred, that the said *W. Woodman*, in his lifetime, and the said plaintiff executor as aforesaid, since the death of *W. W.*, had, ever since the making of the said deed-poll, continued, and plaintiff still did continue, the said sum of 2000*l.* out at interest, upon the said premises. It then averred, general performance by *W. W.* and the plaintiff, and assigned as a breach, that defendant did not save harmless the said *W. W.* in his lifetime, and the said plaintiff, executor, &c. since the death of *W. W.*, from and against all actions, &c. (in the words of the covenant); but on the contrary thereof, on, &c., at, &c. the said *H. W. Parsons*, who then and there made a claim and demand, and claimed to have a right and title of, in, to, and upon the said premises, entered into and upon the same, and cut down grass, trees, &c.; and afterwards, to wit, on, &c. at, &c. caused and procured, and suffered and permitted

one

one *Henry Beaton*, who then and there held and enjoyed the said premises, to attorn to him the said *H. W. Parsons*, and to withhold the payment of the rents, issues, and profits of the same from the said *W. W.*, in his lifetime, and the said plaintiff, executor as aforesaid, since the death of the said *W. W.*, whereby plaintiff was obliged to bring an action for the recovery of the said rents, &c., and incurred great charges and expenses, &c. by reason and means of the said claim and demand of the said *H. W. Parsons*. Second breach, that, after the making of the deed-poll, and whilst the sum of 2000*l.* continued out on mortgage, certain indentures of lease and release, and other deeds, papers, and writings, being the title-deeds of and relating to the said premises, were kept, retained, and withholden by one *Ann Welsh*, at the instance and through the means, and by and through the claim and demand of the said *T. B. W. Parsons*, in the said deed-poll mentioned; whereby the plaintiff was obliged to commence an action for the recovery of the said title-deeds, and was put to great charges, which said several charges and expenses were sustained by reason and means of the said claims and demands in the said deed-poll mentioned. Defendant pleaded, to the first breach, that *H. W. Parsons* had not, at the time of the making of the supposed deed-poll, or at any time afterwards, until or at the time of the exhibiting of the bill of the said plaintiff, any *lawful* right, title, claim, or demand whatsoever, of, in, to, or out of the said premises. To the second breach, a similar plea, that *T. B. W. Parsons* had not any lawful right, &c. Special demurrer and joinder.

1822.

Bovick
against
Wmen.*Littledale,*

.1822.

FOWLE
against
WELSH.

Littledale, in support of the demurrer. The first question arising upon these pleadings is, whether this covenant, being special against the acts of particular persons, extends to all their acts, whether rightful or otherwise. [*Abbott C. J.*, In *Nash v. Palmer* (a) it was expressly determined that such a covenant extends to all acts by droit ou tort.] The same conclusion is also warranted by a variety of former decisions. *Foster v. Mapes* (b), *Tisdale v. Essex* (c), *Perry v. Edwards* (d), *Southgate v. Chaplin* (e), *Lloyd v. Tomkies*. (f) It is therefore clear, that the expression "all claims in law," used in this instrument, means something more than all lawful claims. Then the only question is, whether the acts which are alleged to have been done by *H. W. Parsons* and *T. B. W. Parsons*, amount to claims in law. The first breach alleges that *H. W. Parsons* entered and cut trees, &c. Now entry is one legal mode of making a claim; the entry by *H. W. Parsons* may therefore be considered as a claim in law. Then, secondly, it is stated in the same breach, that he procured the tenant to attorn. If, instead of that, he had brought an ejectment, or an action for the rent, that would have been a claim in law to be acknowledged as landlord, but by the attornment he obtained the same acknowledgment; that, therefore, was a claim in law within the meaning of this covenant. The second breach alleges that the title-deeds were withheld, at the instance and through the claim and demand of *T. B. W. Parsons*, and that the plaintiff was obliged to bring an action for the recovery of them. Now, those

(a) 5 M. & S. 374.

(b) Cro. Eliz. 212. S. C. Ow. 100.

(c) Hob. 34.

(d) 1 Str. 400.

(e) Com. 230. S. C. 10 Mod. 384. (f) 1 T. R. 671.

1822.

 FOWLE
 against
 WELSH.

deeds being the muniments of the estate, the procuring them to be withheld, as stated in this breach, was in fact a claim in law to the estate itself. The declaration then is good, and the pleas, that *H. W. Parsons* and *T. B. W. Parsons* had not lawful title, are bad, according to *Nash v. Palmer*. The Plaintiff is, therefore, entitled to judgment.

R. Bayly, contra. Admitting the pleas to be bad, the defendant is still entitled to judgment; for the declaration cannot be supported. In all the cases which have been cited, the covenant was against acts and not against claims; this case is, therefore, distinguishable from them all. Admitting that, according to *Nash v. Palmer*, the covenant extends to unlawful as well as lawful claims, still the nature of those claims must be ascertained by the other words with which "claims" is associated. The covenant runs thus, "all actions, suits, claims and demands, both in law and equity." Now "claims in law or equity," must mean claims brought in a court of law or equity, although they need not be such as are capable of being enforced. Besides, the first breach does not state that the claim made, was a claim in law or equity; nor does it appear to have been so, for breaking and entering a close and cutting down trees, and procuring an attornment without any right, are mere tortious acts, and not a claim; so also, causing title deeds to be withheld, as *T. B. W. Parsons* is, by the second breach, alleged to have done, is certainly a wrongful act, but cannot be considered as a claim in law or equity to the estate.

ABBOTT C. J. Upon the authority of the case of *Nash v. Palmer*, which is in truth only a confirmation

1822.

FOWLE
against
WELSH.

of many prior decisions, I am of opinion, that this covenant is not confined to lawful claims in law or equity, but extends to all claims, whether lawful or unlawful, made by the persons particularly named in the deed-poll. Then the next question is, whether it sufficiently appears, on the face of the declaration, that the acts alleged to have been done were claims in law or equity. It is impossible to say that the words "claims and demands" are synonymous with "actions and suits," for if so, we should give no effect to the former words, which are well known to the law, and constantly used in releases and other instruments, to denote something more than actions or suits. The first breach does not merely allege that *H. W. Parsons* entered upon the premises, and did certain acts there, but that *H. W. Parsons*, "who made a claim and demand, and claimed to have a right and title to the premises," entered. Now entry by a person claiming to have a right, is one legal mode of asserting that right. The breach then states, that *H. W. Parsons* procured an attornment to himself by the occupier of the land; that, also, is another legal mode of pursuing a claim, and may, therefore, be considered as a claim in law. Then the second breach alleges, that the title deeds were withheld by *A. Walsh*, at the instance and by and through the claim and demand of *T. B. W. Parsons*, one of the persons against whose claims the defendant covenanted to indemnify *W. W.* and his executors, &c. The withholding of the title deeds by *A. Walsh*, at the instance of *T. B. W. Parsons*, is the same thing in point of legal effect as if they had been withheld by the latter himself; and that act, if done by him, would have been in the nature of a claim or assertion of right to the estate.

The

The breaches might perhaps have been better assigned; but, as the defendant has pleaded over, instead of demurring specially to the declaration, I think that the informality, if any, is thereby cured, and that the plaintiff is entitled to the judgment of the Court, the pleas being undoubtedly bad.

1852.

 FOWLER
 against
 WELSH.

BAYLEY J. I am of the same opinion. *H. W. Parsons* and *T. B. W. Parsons* being specifically named in the deed, the indemnity extends to all claims in law or equity, made by them, whether lawful or not. It has been argued, however, that it does not extend to such claims as are set out in the breaches assigned. The defendant cannot avail himself of that objection, unless he shews very clearly what was the meaning of the covenant; for it is a general rule of construction, that ambiguous words are to be taken most strongly against the covenantor. The words here used are, that defendant "would save harmless *W. Woodman*, his executors, &c. from and against all actions, suits, claims, and demands, both in law and equity, which should or might be made by *J. W. Parsons*, *H. W. Parsons*, or *T. B. W. Parsons*," and the first breach alleges, that *H. W. Parsons*, "who then and there made a claim and demand, and claimed to have a right and title to the premises," entered and did certain acts, which is equivalent to saying that he, claiming to have a right and title, did, in assertion of the same, enter and do those acts. Now entry is one legal mode of asserting a right, and, therefore, comes within the meaning of the covenant, as a claim in law; and if this were insufficient, the same breach further alleges, that *H. W. Parsons* procured the tenant in possession to attorn; now attornment makes the person in possession tenant under him to whom the attornment is

1822.

 FOWLE
 against
 WELSH.

made, and therefore, by that act, *H. W. Parsons* procured a recognition of himself as landlord; whence it must be inferred that he claimed a legal title to the premises. The second breach alleges, that the title deeds were withheld, at the instance of *T. B. W. Parsons*, and through his claim to the possession of them; the effect of that is more doubtful, but I think it may be considered as an act done under a claim to the estate. Perhaps this breach might have been bad upon special demurrer; but the defendant, by pleading over, has waived objections of form. The pleas are admitted to be no answer to the declaration. Judgment must, therefore, be entered for the plaintiff.

HOLROYD J. I am of opinion that these breaches are well assigned. The objection taken by the defendant's counsel would, if suffered to prevail, extend to a rightful entry or claim, if not followed up by an action or suit, as well as to an entry made under an unfounded claim; but an entry is a legal mode of claiming or asserting a right; and if an entry had been made by any person having a right, that would certainly have come within the meaning of this covenant as a claim in law. Now the case of *Nash v. Palmer*, and the older authorities which have been cited, shew that claims made by right and those made by wrong, fall under the same legal operation of the covenant upon which this action is founded. If, therefore, a rightful entry by *H. W. Parsons* would have been within the meaning of the words "claim in law," his wrongful entry must be so likewise. The first breach, however, is not confined to the allegation, that *H. W. Parsons* who claimed to have title entered, &c. it goes further, and states, that *H. W. P.* procured an
 attorney,

attornment. Now the effect of that is the same as if the tenant had permitted him to enter and take possession of the premises, and had then received back the possession, and acknowledged him as the landlord. The very act of obtaining such an acknowledgment from the tenant, was in law making a claim of title to the premises. As to the second breach, no person is entitled to title deeds, but in respect of the estate of which they are the muniments. Whatever rights others may have arising out of the estate, he only who is entitled to the estate itself is entitled to the deeds relating to it. I therefore agree with the rest of the Court, that our judgment must be for the plaintiff.

1822.

 FOWLE
 against
 WELSH.

Judgment for the plaintiff. (a)

(a) *Best J.* was in the Bail Court.

Cox, Gentleman, one, &c. *against* COLERIDGE,
 Esq. and Another.

TRESPASS for assaulting plaintiff, and seizing and laying hold of him, and forcing him to go out of a certain room in a certain inn in *Ottery St. Mary*, in the county of *Devon*, whereby he was hurt and prevented from performing and transacting his necessary business there. There was also a count for a common assault. Plea 1st, not guilty, on which issue was joined; 2dly, a justification that defendants were, and are two of the justices of the king for the county of *Devon*; and that so being such justices at the time when, &c. they were assembled in the said room within the said county,

A prisoner, when examined before magistrates under a charge of felony, is not entitled, as of right, to have a person skilled in the law present as an advocate on his behalf, it being a preliminary investigation only, and not conclusive upon him.

1822,

— Cox
against
Coleridge.

and within their jurisdiction, to take the information upon oath of the prosecutor, and the several witnesses touching and concerning a certain felony, before then charged to have been committed by one *G. B.* within the said county, and within their jurisdiction, and upon which charge the said *G. B.* was then in custody before them, and to examine the said *G. B.*, being the party accused, touching the same, and further to do and perform there such things as should to them seem proper as such justices. And that defendants being so assembled in the said room, as such justices, and for the purposes aforesaid, the plaintiff afterwards, and before the time when, &c. not having been summoned before them as a witness touching the matter then in examination, nor being charged as a party concerned in the same, nor coming before them to testify any knowledge concerning the same, with force and arms wrongfully broke and entered into the said room, and intruded himself upon the defendants so assembled therein as aforesaid, and for the purpose aforesaid. The plea then averred a request by the defendants to the plaintiff to leave the room, and that the plaintiff refused to obey it, and continued there in contempt of the defendants, as such justices, and to the disturbance and violation of due order and decency in the administration of justice, and to the hindrance thereof; whereupon the defendants gently laid their hands upon him, &c. There was a second justification, that defendants were lawfully possessed by the consent of the master of the inn of the said room; and that they were there employed in their lawful purposes; and that plaintiff violently and unlawfully broke and entered the same, &c. whereupon, &c. The plaintiff in his replication to the first justification

cation stated, that before and at the time when, &c. he was, and is one of the attorneys of the King's Bench, and well skilled in the laws, statutes, and customs of this realm; and that the said *G. B.*, before the supposed breaking, entry, and intrusion in the plea mentioned, to wit, on, &c. had been, and was apprehended, and in custody under a warrant of defendants, as such justices, and was about to be examined by defendants, as such justices, touching the same, to wit, at, &c.; whereupon the said *G. B.* then and there stated and informed the said defendants, so being such justices, that, upon the examination of certain witnesses, the entire innocence of the said *G. B.*, in the premises, would appear to the defendants as such justices. And that defendants, as such justices, did thereupon discharge the said *G. B.* out of custody, and permit and suffer him to go at large, for the purpose of enabling him to bring such witnesses to be examined by and before the said defendants, as such justices, at a time prefixed by defendants to the said *G. B.* in that behalf, touching the felony aforesaid. And that afterwards, and a little before the time so prefixed to the said *G. B.*, and a little before the said supposed breaking, &c. in the said plea mentioned, to wit, on, &c. the said *G. B.*, and the said last mentioned witnesses, being about to be examined by and before the said defendants, as such justices, touching the said supposed felony, and the said defendants, as such justices, being then and there about to take such information as in the said plea mentioned; he, the said *G. B.*, being an illiterate person and unskilled in the laws and customs of this realm, applied to, and requested and retained the said plaintiff, as such attorney so skilled as aforesaid, to accompany

1822.

Cox
against
COLLIERIDGE.

1822.

Cox
against
COLERIDGE.

him, the said *G. B.*, before the said defendants as such justices; and to assist him, the said *G. B.*, with his, the said plaintiff's counsel, skill, suggestions, and advice, in making his, the said *G. B.*'s defence before them, the said defendants, as such justices, to the said charge; and in clearing himself therefrom, and shewing his, the said *G. B.*'s innocence in the premises, and in examining the said prosecutor and witnesses in the said plea mentioned, and the said witnesses in this replication first above mentioned, being witnesses then and there adduced, and brought by and for the said *G. B.* in that behalf, to be examined by and before the said defendants as such justices, touching the said supposed felony, the said last mentioned witnesses being then and there capable of deposing to and establishing certain facts, from which would appear to the said defendants, as such such justices, the entire innocence of the said *G. B.* in the premises; and that there existed no grounds whatever for suspecting the said *G. B.* to have been guilty of the said supposed felony, or in any way conusant of or implicated in the same. And further to assist and advise him, the said *G. B.*, in the premises, as far as he, the said plaintiff, was by the laws, statutes, and customs of this realm, authorised, enabled, and empowered to do, to wit, at, &c. Whereupon the said plaintiff, having thereupon as such attorney, so skilled as aforesaid, then and there acceded to the said request, and accepted the said retainer for the said *G. B.*, did, as such attorney so skilled as aforesaid, a little before the said time when, &c. for and on the behalf of the said *G. B.*, and at his request, and upon his retainer as aforesaid, accompany the said *G. B.* before defendants, as such justices as aforesaid; and in so doing, did necessarily

enter

enter into the said room in which, &c. for the purpose of assisting and advising the said *G. B.* touching the premises as aforesaid; and did thereupon then and there inform, and give notice to the said defendants, as such justices as aforesaid, that he, the said plaintiff, then was such attorney so skilled as aforesaid; and that he, the said plaintiff, had been, and was so applied to, requested and retained as aforesaid; and that he, the said plaintiff, had then and there entered the said room for the purpose aforesaid, and continued therein from thence, until the said defendants afterwards, to wit, at the same time when, &c. of their own wrong, committed the said several trespasses, &c. There was a similar replication as to the second justification. Demurrer and joinder.

1822.

Cox
against
COLERIDGE.

Coleridge, in support of the demurrer. The replications cannot be supported, unless the plaintiff can establish that an attorney has the right to attend at an examination of this description, on behalf of a party accused of felony. Now there is no authority which can be produced in support of such a claim; and the only cases bearing on the subject, seem to authorise the opposite conclusion. In *Rex v. Justices of Staffordshire* (a), there is an opinion thrown out incidentally by *Bayley J.*, that even in the case of a summary conviction under the game laws, an attorney has no right to be present. That is a much stronger case than this, for there the magistrate acts judicially; but here, he is only making a preliminary enquiry, for the purpose of ascertaining whether there is sufficient ground to com-

(a) 1 *Chitty*, 218.

1822.

Cox
against
Crompton

mit a party for trial. And the case of *Rex v. Borron* (a) is to the same effect. The first statute relative to this subject, is 1 Ric. 3. c. 3., by which power was given to one justice to bail persons arrested for suspicion of felony. Then came 3 H. 7. c. 3., which confined that power to two justices, one of whom was to be of the quorum. These were followed by the 1 and 2 Ph. & M. c. 13., which required both justices to be present together at the time of bailing the prisoner; and in the 4th section, directed the magistrates, previously to their taking bail, to take the examination of the prisoner, and the information of them that bring him. And this was afterwards extended by 2 and 3 Ph. & M. c. 10., to the cases of commitments. Now in all these statutes the legislature seems to have contemplated one agent only in this preliminary examination, viz. the magistrate, and do not appear to have considered it as at all analogous to a trial in which both sides were to be heard. The proceeding is, in these cases, *ex parte* only, and the presence of an attorney for the prisoner cannot, therefore, be necessary. In *Dalton's Justice*, c. 164. p. 407., the law on this subject is laid down very strongly, and shews how little discretion a magistrate has in enquiries of this nature. He says, that "where any felony is committed, and one brought before a justice of peace on suspicion thereof, the justice ought to commit or require bail, though it shall appear to him that the prisoner is not guilty thereof; for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered, on any man's discretion, without farther trial." For this he quotes *Crompton*, 34, and *Lambard*, 229. And in page 408., after enumerating persons who are

(a) 3 B. & 4. 432.

not to be considered as credible witnesses, he adds, "But if one be brought before a justice of peace upon suspicion of felony, although the information against the prisoner shall be by such witnesses, yet it seemeth safest for the justice of the peace to take their information for the king, and to bind them over to give evidence, &c. and to commit the party suspected, and upon the trial to inform the justices of good delivery concerning their credit." [Bayley J. Those citations, I apprehend, are not law at the present time.] They are, however, authorities shewing what the law was formerly, and how little discretion was considered as vested in magistrates; and Lord Hale, *Pleas of the Crown*, vol. ii. p. 121., is nearly to the same effect. He says, "If a prisoner be brought before a justice, expressly charged with felony by the oath of a party, the justice cannot discharge him, but must bail or commit him;" and *Hawkins*, lib. 2. c. 15. §. 1., adopts the opinion of Lord Hale. Nor can the presence of an attorney be requisite, in order to examine witnesses for the prisoner; for it does not appear that the prisoner has any right to examine witnesses in this stage of the case. If the magistrate proceeds under the statute of *R. & M.*, he must examine the witnesses on oath. Now at the time when that statute was passed, the witnesses for the prisoner could not have been so examined. It is true, that Lord Coke, 3 *Inst.* 79., is of a different opinion, but the universal practice, previously to the 1 *Anne*, stat. 2. c. 9. s. 3., shews the contrary; and so was the opinion of *Hawkins*, lib. 2. c. 46. s. 29. If so, it would seem to follow, that it was not competent for the magistrate to examine witnesses at all for the prisoner, and, consequently, that the presence of an attorney cannot for that purpose be necessary. And this view of the case

1822.

Cor
am
Clerk

1822.

Cox
against
COLERIDGE.

is confirmed by the mode of proceeding before a coroner, who is bound, according to Lord *Hale*, *Hist. P. C.* vol. ii. p. 62., to examine witnesses on oath on both sides, and to certify the whole evidence to the justices of gaol delivery. In that case counsel are allowed to be present. But these proceedings are quite distinguishable from the preliminary examinations before magistrates, and are in fact distinguished on this very ground by Lord *Hale*. (a) The next ground for the presence of an attorney is supposed to be, that there may be a question as to bailing the prisoner; but that cannot be necessary. In many cases the magistrate has no discretion to bail, and where he has, he is solely responsible, if he demands excessive bail. The present claim, if established as a right, may lead to great inconvenience. How is a magistrate to know whether a man be an attorney or not? The consequence will therefore be, that any person claiming to be an attorney may assume the right of being present. Suppose the prisoner to be one of a

(a) In *Dalton*, chap. clxv. p. 412. it is laid down thus. "It seemeth just and right the justices of peace, who take information against a felon or person suspect of felony, should take and certify as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as makes for the king and against the prisoner; for such information, evidence, or proof taken, and the certifying thereof by the justice of peace, is only to inform the king and his justices of gaol delivery, &c. of the truth of the matter." But query," (he subsequently adds,) "if the justices of peace or coroner may take upon oath such information, &c. as maketh against the king. It seemeth no. Upon trial of felons before the justices of gaol delivery, the said justices will often hear witnesses and evidence which goeth to the acquittal of the prisoner, yet they will not take upon oath, but do leave such testimony and evidence to the jury to give credit, or to think thereof as they shall see and find cause." If this be law, it may possibly be contended that, subsequently to the 1 *Anne*, st. 2. c. 9. s. 3., the justices of the peace, who before should have heard witnesses in defence of the prisoner, but not upon oath, should now examine those witnesses on oath.

gang,

gang, it may afford the means of communication with those not in custody, and enable them to evade justice. There could be no such thing as a secret examination of the witnesses, which, in a preliminary proceeding, is often absolutely necessary. If this claim be allowed, it will be difficult to distinguish from it the cases of proceedings before a grand jury. Yet it has never been conceived that a prisoner has a right to be present, either in person or by attorney, in such cases.

1822.

Cox
against
COLERIDGE.

Denman, contra. The question is one of considerable importance, inasmuch as of late years the cases placed under the summary jurisdiction of magistrates have greatly increased. Cases of smuggling, and those under the excise laws and game laws, in which the judgments of magistrates are final, and affect the liberty and property of many individuals, will all follow the same rule; and the consequence will be, that in all of them an ignorant party will be obliged to defend himself often in a nice question of law without having any right to legal advice or assistance. Such a consequence will have a tendency to produce great injustice, and the Court will, therefore, pause before they arrive at it. Here the plaintiff claims, in point of form, a right to be present as an attorney; but that is not the substance of it; he claims really, not in the character of an attorney, but in that of a person skilled in the law, or of an advocate for the party accused. The object is, that the party accused shall have the full benefit of an effective cross-examination of the parties accusing him. This will not affect the right of the magistrates, if they please to have a secret examination of the witnesses, which is obviously a measure of police only, and may
still

1822.

Cox
against
Coleman

still be done in a previous or subsequent stage of the case. Here the examination is under the statute of *Ph. & M.*, and must, by law, be in the presence of the prisoner, and the magistrate acts judicially. The object is to throw as much light as possible on the transaction. *Hawkins*, in the passage cited, says, that the party accused must be either bailed or committed, unless it manifestly appear that no such crime was committed, or that the cause of suspicion was groundless. But how is that to appear, if the only efficient mode of procuring that result be excluded? Suppose the accused be deaf and dumb, or illiterate, as in the case here, or a foreigner; in those cases, is he to be utterly without assistance? As to the passages cited from *Dalton*, it may be safely admitted that, if they be law, this demurrer can be supported. But they are clearly not law. The cases, *Rex v. Justices of Staffordshire*, and *Rex v. Borron* are not applicable. For, in the first, the decision of the Court was only that no criminal information could be granted. But even supposing the magistrates had acted erroneously, they would not be liable to a criminal information; for they must have acted corruptly also to induce the Court to interfere; and the opinion incidentally thrown out by *Bayley J.* was not at all necessary to the decision. The case of *Rex v. Borron* was also an application for a criminal information. There the claim was for an attorney to be present to make a speech, and conduct a prosecution before a magistrate, which is very different from the present case. The proceeding before a grand jury is quite distinguishable; there the prisoner himself is not allowed to be present; here he is necessarily present, and consequently the law which requires his presence must give him

him incidentally the right to such assistance as can alone make his presence useful for the ends of justice. And the proceeding before a grand jury is ordinarily followed either by immediate discharge or trial in open court. In the case of an inquisition before the coroner, a party has a right to attend by counsel, and yet there no particular person is under accusation at the time. *Barclay's case.* (a) This case is, however, stronger; for here a particular individual is, in the first instance, accused before the magistrate who is to hear the case, and is to decide whether a committal is to take place or not. If so, it is surely essential to justice that the fullest materials should be afforded for his decision, which can only be by giving to the accused, who may be illiterate, the right to be assisted by a person skilled in the law. [*Bayley J.* Is not the circumstance, that the inquisition may be conclusive upon them as to the flight, the ground on which parties have a right to attend before a coroner by counsel? *Barclay's case* was that of a *felo de se*, and the inquisition was therefore not traversable.] It is said to be doubtful whether any witnesses can be examined for the prisoner, because they could not, at the time of the statute, be examined on oath. But the authority of Lord Coke, in the 3d *Institute*, is strong, (and Lord Hale, *Hist. Pl. Cr.* vol. ii. p. 283. assents to it,) that previously to the statute of *Anne* there was no known law against the examination of witnesses on oath for the prisoner. The statute may therefore be considered as declaratory of the law in that respect. And even if that be not so, the consequence does not follow; for the attorney is at all events necessary to cross-examine the

1821.

Col
Higgin
Columb

(a) 2 Sid. 101.

1822. witnesses for the prosecution. And this is the more necessary, inasmuch as their depositions, certified by the magistrates, may afterwards, in case of their death or wilful absence, be read in evidence against the prisoner, on the ground that he has had the opportunity for such cross-examination. (a) In this case, however, it appears on the record, that a day was given to the prisoner by the defendants, in order that he might produce witnesses. The objection cannot therefore be taken here. The claim being in this case founded on the plain principles of justice, it is incumbent on the other side to shew some authority against it. This they have not done, and, consequently, the plaintiff is entitled to the judgment of the Court.

Cox
against
COLLIERIDGE.

ABBOTT C. J. If I thought that our decision in favour of the defendant would have a tendency to produce any inconvenience to the administration of justice, or to infringe the liberty of the subject, I should certainly pause before I agreed to it; but as I am convinced that it will produce no such effect, and that, on the contrary, in an enlarged view of the subject, it will really prove more beneficial to defendants than the opposite conclusion, I do not think it right to delay giving our opinion respecting this case. The plaintiff, it is clear, cannot be entitled to succeed, unless he can establish the position, that every person accused before a magistrate, whether of felony or misdemeanour, has a right to have some person of skill in the law to attend on his behalf. The case cannot be put on the nature

(a) See *Rex v. Paine*, 1 Salk. 281. 5 Mod. 163. S. C. 2 Hawk. P. C. lib. 2. c. 46. s. 3. to 10.

1822.

Cox
against
COLERIDGE.

of the plaintiff's character as an attorney, for it is no part of the proper duty of an attorney to attend in such cases. He must attend only in the character of an advocate. Now, if such a right as this really existed, one would expect to find it recognised in some of our books of authority. It is true that, in practice, magistrates do permit, on many occasions, the presence of advocates for the parties accused. Such a practice is undoubtedly very convenient where doubts arise on matters of law, respecting which the magistrates (who must, however, be considered by the Court as competent to judge in such cases,) may wish to have the benefit of legal assistance. But it does not follow, from the existence of such a practice, that there is any such right as that now claimed. The right, if it existed, might be productive of great inconvenience. It would be difficult to distinguish between the cases of an offence committed by one, and that of one committed by a number of individuals. And yet, in the latter case, if an attorney has a right to attend where one out of a gang is examined, he may obtain and convey information to the rest; the effect of which might be to frustrate the justice of the case. Besides, it must follow, that, if the party accused has this right, it cannot be denied to the accuser. The effect of that would be, that great expence and inconvenience would follow, and great prejudice to the prisoner in the majority of cases; as it would be much more likely to happen that a prosecution should be attended by counsel than a defence, and the magistrate would be probably as much influenced, if at all, by an advocate for the one side as the other. The nature of the proceeding also shews that this cannot be properly demanded as a right. What is

E

it?

1822.

—
Cox
against
Coleman.

it? It is only a preliminary enquiry, whether there be sufficient ground to commit the prisoner for trial. The proceeding before the grand jury is precisely of the same nature, and it would be difficult, if the right exists in the present case, to deny it in that. This being only a preliminary enquiry, and not a trial, makes, in my mind, all the difference. At a trial before a magistrate it may perhaps be different. But to establish the right now claimed would, as it seems to me, be productive of great inconvenience. By adhering to the present practice we shall prevent this. It is far better and safer to leave it to the discretion of the magistrates in each particular case, whether they will admit or exclude an advocate for the accused party. I think, therefore, that our judgment should be for the defendants.

BAYLEY J. This is not the case of a summary conviction, but of an accusation of felony, and the decision of the magistrate is not conclusive. Whenever the former case shall arise, I wish not to be considered as bound by the obiter dictum, which I am reported to have used in the case cited; I am open to hear that point argued whenever it becomes necessary. This question is, however, quite different; and my present opinion does not go upon any distinction between the character of an attorney and a counsel, for it appears to me that neither the one nor the other has a right to attend in such cases as the present, either on behalf of the prosecution or for the prisoner. As to the passages which have been cited from *Dalton*, I am by no means satisfied with their authority; for I think that a magistrate is clearly bound, in the exercise of a sound discretion, not to commit any one, unless a *prima facie* case

is

1822.

 Cox
 against
 Colman.

is made out against him by witnesses entitled to a reasonable degree of credit. It seems to me that it is only a privilege to the accused to be allowed an adviser, and not a right; but it may be very useful for a magistrate to grant it in many cases, and it is to be presumed that he will do so on all proper occasions. Besides, if the party be really innocent, he will himself be able to suggest to the magistrate all such matters as may tend to elucidate the truth. There is an analogy between this case and an enquiry before a grand jury; and if it be hard, as it is argued, that a party accused, who by law is allowed to be present at the enquiry, should be deprived of the assistance of an advocate, in how much worse a situation is he placed before a grand jury, where he is not even allowed to be present himself; and yet, in that case, upon a bill being found, a warrant immediately issues, upon which he may be deprived of his liberty. There is no authority which has been cited in favor of the right now claimed, and the state of the law at the time when the statute of *Ph. & M.* passed, affords a strong argument against it, for at that period the witnesses for a prisoner could not be examined upon oath, and the only possible benefit which could at that time be derived from the presence of an advocate for the party accused, would be the cross-examination of the witnesses for the crown. This, however, is a narrow ground, and I do not rely upon it as a foundation for my opinion, which rests upon the broad ground that this is entirely in the discretion of the magistrate, and cannot be claimed as a right.

HOLROYD J. I am of the same opinion, that the right claimed cannot legally be supported. A magis-

1822.

Cox
against
COLERIDGE.

trate, in cases like the present, does not act as a court of justice; he is only an officer deputed by the law to enter into a preliminary enquiry, and the law which casts upon him that jurisdiction, presumes that he will do his duty in enquiring whether the party ought to be committed or not. The claim now set up must be to have any person skilled in the law present at the enquiry; for the plaintiff cannot rely upon his legal character of an attorney. This claim, therefore, must be general; that any person skilled in the law has a right to attend, or it cannot be supported at all. Then, can such a general claim be supported? There is no authority in the books for it, nor is it agreeable to the usual practice in such cases. It certainly may be very convenient and desirable, in many instances where legal doubts arise, that a party should have such assistance, but that alone cannot establish the general right; I think, therefore, that as the magistrate, in cases like the present, only commits the party for the purpose of further answering the charge made, the present claim cannot be supported.

BEST J. In the case of *The King v. Borron*, this Court declared that an attorney has no right to be present at an enquiry before a magistrate on a charge of felony. This right of an attorney was not the principal point then under our consideration, and I therefore should not feel myself precluded by the authority of that case from again examining the question. I cannot discover any ground on which an attorney can claim a right to attend an examination of this sort, either for the prosecution or the prisoner. What authority is there to support such a right? We have been referred to none
and

and none can be found. It cannot be contended, that the common law acknowledges any such right. It is however argued, that the examination of a prisoner by a magistrate, under the statutes of *Ph. & M.*, is a judicial enquiry, and that therefore the prisoner has a right to the assistance of an attorney. But the history of these statutes proves that they were not intended to authorise any such thing. The preamble to the 1 and 2 *Ph. & M. c. 13.*, informs us, that the 3 *Henry 7. c. 5.*, which had restrained the power given to one magistrate by 1 *Ric. 3. c. 3.*, to bail persons accused of felony, had not prevented single magistrates, by sinister means, from setting at large the greatest offenders. This statute, after declaring what offences shall be bailable, and the manner in which the justices shall proceed in admitting them to bail, directs, that before the justices admit to bail, they shall take the examination of the prisoner and the information of them that bring him, and certify them to the justices of gaol delivery. This statute did not, however, require any examination to be taken where the prisoner was committed. I think, therefore, that the principal, if not the only object of the legislature, in passing this law, was to require information to be given to the justices of gaol delivery of the cases in which the magistrates had admitted prisoners to bail, and was not to institute a judicial enquiry. The information thus obtained was found useful on the trials of prisoners, and, therefore, the 2 and 3 of *Ph. & M. c. 10.* extended the provisions of the former act to the cases where the prisoner was committed; and the only object, as it seems to me, was to give assistance to the Judge before whom the prisoners were to be tried; and so far was this examination from being a judicial en-

1822.

Cox
against
COLKIDGE.

1822.

*Cox
against
Colquhoun.*

quity, which means an enquiry in order to decide on the guilt or innocence of the prisoner, that, as the law was administered a few years after the passing these statutes, the justices, even where it appeared that a prisoner was not guilty, were not to discharge him without bail. *Dalton*, c. 164. The modern practice is, indeed, different, and is more consistent with law and humanity; and I refer to *Dalton*, only to shew that it could not then have been the opinion of the profession that this examination was any thing like a judicial enquiry. It has been argued that a prisoner under examination should have the assistance of an attorney, to cross-examine the witnesses for the crown, the depositions taken being, in certain cases, evidence against him, on account of his having had an opportunity for cross-examination. But this does not mean cross-examining by counsel or attorney, for that formerly was not allowed to a prisoner, even on his trial. (a) Besides, if this right exists, there can never be any private examinations, which are very frequent, and often very necessary for the purposes of justice. They are useful, not merely to take down in writing such evidence as is to be offered at the trial, but to find where further evidence may be obtained, and to get at accomplices. These objects would be defeated if any one had a right to be present who could convey intelligence of what had passed. It may be said; that as the prisoner must be himself present, he may communicate with his accomplices; but the magistrates, whilst he is under commitment for further examination, may lawfully prevent him from giving intelligence to his companions. It may be extremely hard that an innocent

(a) *Hawkins*, lib. 2. c. 32. s. 1.

person should be confined for an hour, when, if he were allowed professional assistance and witnesses, he could demonstrate his innocence, and entitle himself to his discharge. But there is no rule, however wise, that does not produce some inconvenience or hardship, and the question always must be, does the good outweigh the evil. Considering how many desperate offenders might escape justice, and proceed uninterrupted in their guilty career, if this right were allowed, I have no hesitation in saying that it ought not to be admitted, and that we ought to give judgment for the defendants.

Judgment for the defendants.

1822.

Cox
against
COLBRIDGE.

HARVEY and Others, Assignees of M. B. HARVEY and J. W. HARVEY, Bankrupts, *against* RAMSBOTTOM and Others.

Friday,
November 15th.

ASSUMPSIT for money had and received by the defendants, to the use of the plaintiffs, as assignees.

At the trial before *Abbott C. J.*, at the sittings after last *Hilary* term, it was contended, on the part of the plaintiffs, that both the bankrupts had committed acts of bankruptcy on the morning of the 21st May, 1814. The jury, under the direction of the Lord Chief Justice, found a verdict for the plaintiffs, and it was agreed that the damages should be referred. But, on a motion being made, on the part of the defendants, for a new

A trader having been arrested on the 20th May, desired his servants not to let into the house any persons whom they did not know, as he was afraid of being arrested again. On the morning of the 21st the doors of the house were kept shut, and no person was admitted until it had been ascer-

tained from the window who he was: Held, that an act of bankruptcy was committed on that morning, although no creditor was actually denied.

1822.

HARVEY
against
RAMSBOTTOM.

trial, on the ground that *M. B. Harvey* had not committed any act of bankruptcy, the Court directed the following case.

In the beginning of *May*, 1814, and for some years previously, *M. B. Harvey* and *J. W. Harvey* carried on business as bankers at *Rockford* and *Billericay*. *M. B. Harvey* lived at *Witham*, which is 25 miles from *Rockford*, and 30 miles from *Billericay*. On the 16th *May* in that year, *J. W. Harvey* committed an act of bankruptcy, by absconding with a large sum of money belonging to the partnership. On the 20th *May*, *M. B. Harvey* having heard of his partner's absconding, sent for two of his private tradesmen at *Witham* and paid their bills, stating to one of them that he was ruined, and did not wish any tradesman to lose any thing by him. In the evening of the 20th *May*, *M. B. Harvey* was arrested in his own house at *Witham* for upwards of 1400*l.*, upon a writ against him and *J. W. Harvey*, by an attorney, whose name was in the warrant, in company with another person. *M. B. Harvey* said it was not a partnership-debt; he had nothing to do with it, and desired the officer to let him send for his son, *D. W. Harvey*, who was a professional man, and promised the officer that he should have access to him on the following day. After the departure of the officer, *M. B. Harvey* expressed himself angrily to his servants for having let those men in; his two servants assisted him to bed, and he desired them not to let any person into the house they did not know, stating that he was afraid of being arrested again; and that if he was ruined himself, he did not wish to ruin any body else and did not wish to have any body bound for him. In consequence of this, on the next day, the 21st, the
servants

servants did not open the door without ascertaining from the window what persons required admission. The key of an outside gate was delivered by one *Turner*, who used to work in the garden, to one of the servants in the house. The servants kept the house in this way until *D. W. Harvey*, the son and attorney of the bankrupt, arrived in the afternoon of the next day, *Saturday* the 21st, but no persons called upon the said *M. B. Harvey* during that time. On that day, after *D. W. Harvey* arrived, he went to the officer who went up with him to *M. B. Harvey's* house, and a bail bond was given immediately. One of the plaintiffs came that day, and a *Mr. Medina* called about nine o'clock in the evening, and rung at the bell and was let in. He asked to see *D. W. Harvey*. The latter had directed the servant, in the presence and hearing of *M. B. Harvey*, not to let him, *M. B. Harvey*, be seen, and desired that he might be got up stairs immediately. *D. W. Harvey* was told that *Medina* had asked for him, and he went to talk to *Medina*, and said that he would keep him in talk while the servants got their master, who was old and paralytic, up stairs. *M. B. Harvey* went up stairs most part of the way by himself, which he had not done before since his illness, he went without his stick, he had been ill two or three weeks and had never got well since. *Medina's* dealing with the bankrupts was this; he had exchanged an acceptance with the bankrupts for his accommodation for 2000*l.* a few days before, and he went to enquire about the acceptance. He enquired for *D. W. Harvey*, and asked what was become of his bill, as he wished to get it back; and the latter knowing the nature of his enquiries, and that he had no claim upon his father, and thinking his father too ready

1822.

 HARVEY
 against
 RAMSBOTTOM.

to

1822.

HARVEY
against
RAMSDOTTOM.

to communicate, and that he might be entrapped by him, wished *Medina* not to see him. When *Medina* was gone, *M. B. Harvey* returned down stairs to supper. On the *Sunday*, the 22d, the servants left the door open as usual, understanding that no arrest could take place on that day. *D. W. Harvey* went away on that day. On *Monday*, the 23d of *May*, the doors were kept fast all the day, and on *Tuesday* the 24th, *M. B. Harvey* left his house at *Witham*, and went to *Rochford*, to the house of *J. W. Harvey*, for the purpose of paying the notes of the house, and he continued there visible to every body, and paid all the notes that appeared until no more were brought forward. He then returned to *Witham*. On the 24th, the defendants made a large advance of cash to *M. B. Harvey*. The question for the opinion of the Court was, whether *M. B. Harvey* committed any act or acts of bankruptcy under the circumstances, and if he did, at what time the interest of the assignees by relation to the act of bankruptcy accrued.

F. Pollock for the plaintiff. *M. B. Harvey* committed an act of bankruptcy on the morning of the 21st.; for he gave orders to his servants not to let any persons in whom they did not know, saying he was afraid of being arrested, and on the following day the house was shut up. In *Lloyd v. Heathcote*, it was held, that the act of a trader giving a general order (a), to be denied to all comers, was sufficient evidence of a beginning to keep house with intention to delay creditors, and that a beginning to keep house with such intention, constituted

(a) 2 Brod. & Bing. 338.

an act of bankruptcy, although no creditor were actually delayed. He also cited *Bayly v. Schofield* (a), and *Chenoweth v. Hay* (b), and *Robertson v. Liddell*. (c)

1822.
HARVEY
against
RAMSBOTTOM.

Parke, contra. To constitute an act of bankruptcy, there must be some act done by the trader, accompanied with an intention to delay his creditors. Here the act relied upon is a beginning to keep house; now that means either the actual excluding of creditors altogether from the house; or the bankrupt's removing from that part of the house to which creditors usually have access. Now here the place from which all persons were excluded on the 21st *May*, was not the usual place of business of the trader, and that distinguishes this from all the other cases. In order to constitute a beginning to keep house by an exclusion of creditors altogether, there must not only be an order by the bankrupt to deny him to creditors, but an actual denial. Here the order was not to deny the bankrupt to creditors only, but to all persons; and it was given by an aged and infirm person, who had been alarmed in consequence of having been arrested. This, therefore, can hardly be construed into an order to deny him to creditors. But no creditor was actually denied. Now an order by a trader to deny him, is not an act of bankruptcy, unless there be an actual denial. *Jackman v. Nightingale* (d), *Hawkes v. Saunders* (e), *Garret v. Moule*. (f) In *Dudley v. Vaughan* (g), Lord Ellenbo-

(a) 1 M. & S. 338.

(c) 9 East, 487.

(e) *Cooke's Bankr. Laws*, 174.

(g) 1 Campb. 271.

(b) 1 M. & S. 676.

(d) *Bull. N. P.* 40.

(f) 5 T. R. 575.

1822.

HARVEY
against
RAMSBOTTOM.

rough held, that there must be a denial to a creditor who asked to see the bankrupt personally, and that a denial to a creditor who merely demanded payment of a debt, without asking to see the bankrupt, was not evidence of a beginning to keep house; and in *Garret v. Moule*, it was held, that a keeping house without an actual denial to a creditor, was not an act of bankruptcy. [Bayley J. In *Lloyd v. Heathcote*, Burrough J., upon whose award the question in *Garret v. Moule* was raised, considered that that case was overruled by the case of *Robertson v. Liddell*.] In *Heylor v. Hall (a)*, it was held, that a man's keeping his house for a long time, did not constitute an act of bankruptcy; and that case is recognised in *Bacon's Abr. tit. Bankruptcy*. If a mere order to deny a trader to creditors, unaccompanied with an actual denial, be an act of bankruptcy, this consequence will follow, that if a trader were to order his servants not to admit his creditors generally, and afterwards changed his mind, and all creditors were admitted to see him, that would be an act of bankruptcy.

ABBOTT C. J. I was surprised to find, upon reading this case, that the Court, upon the motion for a new trial, had ordered the facts to be stated in a special case; for when we advert to the words of the statute, 1 Jac. 1. c. 15. s. 2., it is impossible to doubt, that a trader who intends to delay his creditors, either by keeping house, or otherwise absenting himself, is guilty of an act of bankruptcy, although no creditor be thereby actually delayed. The words are "that every trader

(a) *Palmer*, 325.

who shall begin to keep his house, or otherwise absent himself, to the intent or whereby his creditors shall or *may* be defeated or delayed, shall be adjudged a bankrupt. Now did not the bankrupt begin to keep house as a mode of absenting himself with an intent to delay his creditors? It appears, that *M. B. Harvey* having been arrested on the 20th *May*, desired his servants not to let into the house any person whom they did not know, stating as a reason that he was afraid of being arrested again. On the morning of the 21st of *May*, the servants act upon this order, and no persons are admitted into the house until it had been first ascertained from the window who they were. It is impossible to doubt, upon this statement of facts, that there was a beginning to keep house, to the intent, and whereby creditors *might* be delayed, on the morning of the 21st *May*, when the doors were kept closed, although in fact no creditor then called. The case of *Lloyd v. Heathcote* is an authority expressly in point.

1822.

HARVEY
against
RAMSBOTTOM.

Judgment for plaintiff.

GIRDLESTONE *against* ALLAN.

Saturday,
November 18th.

MARRYAT had obtained a rule to shew cause why the indenture whereby the defendant had granted an annuity of 1050*l.* to the plaintiff, and the bond and warrant of attorney given to secure the same, should not be delivered up to be cancelled, and the judgment entered up on the warrant of attorney be vacated. The ground of the application was, that part of the con-

The 17 G. 3. c. 26. s. 4. is not imperative on the Court, but it is in their discretion either to vacate the securities given for an annuity in case of a violation of that clause of the act, or to do so on certain

terms, or to refuse to do so, according to the circumstances of each particular case.

sideration

1822.

GIRDLESTONE
against
ALLAN.

sideration money for the purchase of the annuity had been returned to the plaintiff, contrary to the statute 17 G. 3. c. 26. s. 4. It appeared, that the plaintiff, who was an attorney, and in partnership with two others of the name of *Bellamy*, had negotiated the annuity for the defendant, and had ultimately, in conjunction with one *James Watson*, become the grantee of it himself. The consideration money was duly paid, and the defendant then repaid to the plaintiff the amount of the bill of costs of the plaintiff and his partners for procuring the annuity. The bill contained the following charge. "Fee on negotiating the annuity, and for many letters to you and Mr. *Corfield*, and attending on Mr. *Watson* thereon, at 10s. per cent., 35*l*." The affidavits in answer negatived all fraud on the part of the plaintiff, and stated, that the bill was bonâ fide for work done for the defendant, and the charges fair and reasonable; and that the money returned by the defendant was not appropriated to the plaintiff, but carried to the general funds of the firm, and that no part of it was received by *Watson* at all. On shewing cause, the plaintiff offered to reduce the annual payment to 700*l*; and the only question was, whether it was imperative on the Court to vacate the securities, or discretionary with them to refuse to do so on the terms offered.

Scarlett and *Campbell* shewed cause, and contended that this was an application to the discretion of the court; and in support of that position they referred to *Barber v. Gamson*(a), and the cases there cited.

(a) 4 B. & A. 281.

Marryat and Abraham, *contra*. The act is imperative: the words are, that in case any part of the consideration money be returned to the party advancing the same, it shall and may be lawful for the court to order, &c. Now where the act to be done is for the public benefit, these words, "it shall and may be lawful," in an act of parliament, are to be construed as imperative on the court. Here it is for the public benefit; for it is for the protection of needy persons from the unreasonable demands of those who would otherwise take an unfair advantage of their necessities. The case of *Barber v. Gamson*, was not heard by the full court, and was only the opinion of two judges as to this point.

1822.

GIBBLESTONE
against
ALLAN.

ABBOTT, C. J. The only question here is, whether this act of parliament be imperative on the court, or whether we have a discretionary power vested in us. I think that we have a discretionary power. In *Cook v. Tower* (a), the Court of Common Pleas came to this conclusion, and there Lord C. J. *Mansfield* puts fraud as the ground on which alone the court ought to interfere; and Mr. Justice *Chambre*, speaking of this section, says, "The expression in the three preceding sections is, that the instrument shall be wholly null and void: the fourth only says that it shall and may be lawful for the court to cancel the deeds, which is of a very different import. Where these words have been considered imperative, they have been so held from the nature of the case. It is in this case discretionary with the court, whether they will entertain the application."

(a) 1 *Taunt.* 372.

Since

CASES IN MICHAELM ~~TERMS~~

1822.

GIRDLESTONE
against
ALLAN.

Since that case was decided, severally, it was
fore that court, in which they set aside the
on certain terms which could not be made
the act had been imperative on the court
of *Barber v. Gamson*, decided by the court
and *Holroyd*, in this court, is to the effect
that decision I entirely concur, and I think
most mischievous if we were to con-
perative on us to vacate securities.
motion. The objection in this case
one on the part of the defendant.
necessary to decide as to its validity
of opinion that we ought to discharge
on the terms offered by the plaintiff.

Per Curiam.

Rule discharged on the plaintiff
duce the annuity to 700*l*.

Monday,
November 18th.

The KING against The Justices

BY an act passed in the 50 G. 3.
in the parish of *Gosforth*, in the
land, and in which the general inclosure
recited. "It was enacted, that once

A clause in a private inclosure act, declaring that no item or charge in the accounts of the commissioners shall be binding to the parties concerned, or valid in law, unless the same shall have been of peace in the manner therein pointed out; does not take away a subsequent clause "to the party grieved by any thing done in pursuance of the inclosure act, (other than and except such determinations as were in the inclosure act declared to be binding, final, and conclusive," the act by a justice not falling within this exception.

(a) 41 G. 3. c. 103.

There

year, during the execution of that act, (such year to be computed from the day of the passing thereof,) the commissioners should, and they were thereby required to make a true and just statement, or account of all monies by them received and expended, or due to them for their own trouble and expences in the execution of that or the recited act; and such statement and account when so made, together with the vouchers relating thereto, should be by them laid before one of his majesty's justices of the peace for the said county of *Cumberland*, (not interested in the said division and inclosure,) to be by him examined and balanced: and such balance should be by such justice stated in the book of accounts to be kept in the office of the clerk of the commissioners; and no charge or item in such accounts should be binding to the parties concerned, or valid in law, unless the same should have been duly allowed by such justice." And by a subsequent clause it was enacted, that "if any person should think himself aggrieved by any thing done in pursuance of that act, or the recited act, (other than and except such determinations as were by that or the said recited act declared to be binding, final, and conclusive; and, except in such cases, where an issue at law was thereinbefore authorised to be tried,) then he might appeal to the general quarter sessions of the peace, &c. &c." In pursuance of the first of these clauses, the commissioners on the 18th of *May*, 1822, made out an account of monies expended by them in the execution of the act, and laid it, together with all necessary vouchers, before one of his majesty's justices of the peace for the county, (not interested in the inclosure,) by whom it was examined, balanced, and allowed. At the Midsummer sessions certain persons, interested in

1822.

The KING
against
The Justices of
CUMBERLAND.

1822.

The King
against
The Justices of
Cumberland.

the inclosure, appealed against that allowance. It was then objected for the commissioners, that the court of quarter sessions had no jurisdiction, but the justices, there assembled, received and heard the appeal, and made an order thereupon, disallowing several items included in the account as it was originally allowed.

The *Solicitor-General* now moved for a writ of certiorari, to remove that order of sessions into this court for the purpose of having it quashed, and contended that the order ought not to have been made; for although the clause, relating to the accounts of the commissioners, does not expressly state that they are to be binding and conclusive, when balanced and allowed in the manner there pointed out, yet that must be inferred, for to say that the accounts shall not be binding until allowed, is in effect saying, that when allowed they shall be binding. Then the clause giving an appeal in certain cases, excepts those determinations which were by that act, or the general inclosure act, (therein recited,) declared to be binding, final, and conclusive; and there is no clause in the whole of this act to which that exception can apply, unless it be held applicable to the allowance of the accounts by a single justice, which argument was much relied upon by Lord *Ellenborough*, in *The King v. The Commissioners of Dean Inclosure* (a). Here the act appoints a single justice as the tribunal before which the accounts are to be settled; his decision is therefore conclusive, according to *Boyfield v. Porter* (b).

ABBOTT C. J. I think that we cannot by inference exclude the operation of the appeal clause of this act.

(a) 2 M. & S. 80.

(b) 13 East, 200.

There

There is no positive enactment that the allowance of the commissioners' accounts, by a single justice, shall be final and conclusive. Now it appears to me, that the words "binding, final, and conclusive," in the excepting part of the appeal clause, must be confined to those proceedings which are made binding, final, and conclusive, by some affirmative declaration in the statute. There is no such declaration as to the matter in question, and the whole argument, in support of the motion, is founded upon inference alone. I am therefore of opinion, that the justices at sessions had jurisdiction, and did right in hearing the appeal.

1822.
 The King
 against
 The Justices of
 the Peace.

HOLROYD J. (a) If that which has been contended for were a necessary inference, there would be much weight in the Solicitor General's argument, but that is not by any means the case. It is true, the act in question excepts out of the appeal clause those determinations, which are by that act, or the general inclosure act therein recited, declared to be binding, final, and conclusive; but the clause relating to the allowance of the accounts, contains no declaration that when allowed they shall be binding, final, and conclusive. The words there used are, "no charge or item in such accounts shall be binding to the parties concerned, or valid in law unless the same shall have been duly allowed." Now the utmost effect which can be given to those words appear to be this, that the allowance of the accounts, in the mode pointed out, shall be binding if not appealed from.

(a) Bayley J. was in the Bail Court.

1822.

The King
against
The Justices of
Cumberland.

BEST J. I think it quite clear that the appeal is not taken away in this case. The allowance of the accounts cannot be considered as a judicial decision of the justice, which disposes of the case of *Boyfield v. Porter*. In the case of *The King v. the Commissioners of Dean Inclosure*, which has been referred to, the enactment was, that the "commissioners should order and finally direct" as to the matter in dispute: here the act says that no accounts shall be binding or valid unless allowed, which words cannot have the same operation as the other expression. The true meaning of them is, that the allowance shall be valid and binding unless overthrown by appeal.

Rule refused.

Monday,
November 18th.

WOOLLEY, Executrix, &c. against KELLY and Others.

*See Taylor v. Gregory 2 B. & Adol. 774
Hall v. Phillips 9 Bing. 37*

In an action against several defendants a verdict was taken for the plaintiff for 400*l.* damages, subject to a point of law, reserved for the opinion of the Court; and in case that point should be determined in favour of the plaintiff, then subject to the award of a barrister as to the damages. The point of law having been decided in favour of the plaintiff, the arbitrator having been consulted by one of the parties in the cause, declined proceeding in the reference. One of the defendants refused to name any other arbitrator. Under these circumstances the Court ordered judgment and execution to issue against that defendant for the damages found by the jury, unless he would consent to refer the damages to some other arbitrator.

A RULE nisi had been obtained, calling on the defendant, *Kelly*, to shew cause why the plaintiffs should not be at liberty to issue execution against him for the value of the goods for which this action was brought, or why the arbitrator named in the order of reference in this cause, should not be at liberty to name another arbitrator. It appeared by the affidavits, that in December, 1821, a verdict was found for the plaintiff for

400*l.*,

400*l.*, liberty being reserved to the defendants to move to enter a nonsuit, and in case the Court should think that the defendants had no ground for the application, then it was to be referred to a barrister to ascertain the amount of the damages. A rule for entering a nonsuit was obtained, but afterwards discharged. (a) The parties attended the arbitrator on the 21st of *June*, when, on its being suggested that the arbitrator had been consulted as counsel in the cause, he declined proceeding with the reference. The defendant, *Kelly*, having refused to name another arbitrator, the plaintiff, in this term, obtained the above rule, against which

1822.

WOOLLEY
against
KELLY.

Archbold now shewed cause, and contended that the Court had no power to compel the defendant, *Kelly*, to name another arbitrator; that it was contrary to justice that execution should issue for the sum for which the verdict was taken, no inquiry having taken place as to the value of the goods. The consequence, therefore, must be, that the case must go down to another trial, when the defendant expected, by other evidence, so to alter the facts proved at the former trial, as to obtain a verdict.

Per Curiam. Where a verdict is taken for the plaintiff, with damages, judgment and execution follow of course, unless some special cause be shewn to the contrary. Where the verdict is taken, subject to a reference, the Court will, upon the application of the defendant, prevent the plaintiff from entering up judgment, or issuing execution. It lies, however, upon the

(a) See 5 B. & A. 744.

1833.

Wheat
against
Kelly.

defendant to shew to the Court some sufficient reason why judgment and execution should not follow the verdict. Does the defendant, *Kelly*, in this case, shew any such sufficient cause? He agreed at the trial to refer the quantum of damage to a barrister, who, from motives of delicacy, refused to act as referee. The defendant then refuses to name any other arbitrator, and wishes to make the breach of his agreement to refer a ground for staying judgment and execution; but that certainly is not a sufficient ground; and therefore, unless the defendant consent to refer the quantum of damages to some other barrister, let judgment be entered up, and execution issue for the damages awarded by the jury.

The defendant then consented that the question of damages should be referred to another arbitration.

Rule accordingly.

Tuesday,
November 19th.

ELLIS against ARNISON.

By an inclosure act it was enacted that the allotments in lieu of tithes should be inclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed lands, or be bounded by any river or other sufficient fence in the judgment of the commissioners. A ditch, which had been immemorially the only boundary between the common and adjoining townships, is a fence within the meaning of the act.

BESIDES the issues in law in this case, upon which judgment was given upon demurrer, (ante Vol. V. p. 47.) there were two issues in fact, one of which was, whether the allotment made to the plaintiff was inclosed and fenced, according to the act of parliament, in the manner therein prescribed, in such parts thereof as were not directed to be fenced by any other proprietor, or as did not adjoin any inclosed lands, or as were not bounded by a river, or some other sufficient fence, in the judgment of the said commissioners. The following

1822.

 Ellis
 against
 Arundel.

was the clause of the act in question. " And be it further enacted, that the several allotments which shall be made to the said *B. Lord Hotham* and *Sir G. H. F. Berkeley*, and *S. Dayley*, as impropiators as aforesaid, and to the said *W. Ellis*, or his successors, for or in respect of any messuages or glebe lands belonging to the said church of the said parish of *East Moulsey*, and in lieu of tithes within the said parish, shall be inclosed and fenced on all such parts and sides as shall not be directed to be fenced by any other proprietor, or as shall not adjoin to any inclosed lands, or be bounded by any river, or other sufficient fence, in the judgment of the said commissioners, with good thriving quicksets, guarded on both sides in a substantial and proper manner, with proper ditches, and good and substantial stiles and carriage-gates, where necessary, for the convenient occupation thereof; and the whole costs and expenses of making and keeping such fences, stiles, and gates in good repair for seven years, shall be deemed and considered as part of the expenses of carrying this act into execution, and shall be borne and defrayed accordingly, by the persons whose lands and grounds in the said several parishes shall be discharged from tithes by virtue of this act, in such parts and proportions as the said commissioners shall order and direct; and such fences shall, after the expiration of the said term of seven years, be maintained and kept in repair by such person or persons as the said commissioners shall, in and by their said award, order and direct. At the trial of the cause before *Abbott C. J.*, at the *Middlesex* sittings after last *Hilary* term, it appeared that in one part of the allotment made to the plaintiff, the only fence was an old deep ditch or drain, which had been immemorially the only boundary in that part between the

1822.

ELLIS
against
ARNISON.

commons and the two adjoining townships. There was no hedge or rail, or any thing else protecting the ditch; but it was sworn, by the surveyor to the commissioners, that, in the judgment of the commissioners, the ditch alone, in its then state, was a sufficient fence. The Lord Chief Justice was of opinion, that this act of parliament must be construed with reference to the provisions of the general inclosure act, 41 G. 3. c. 109., and that if so construed, a mere ditch could not be a fence within the meaning of the act; and sections 25, 26, and 27 were particularly referred to. He accordingly directed the jury to find a verdict for the plaintiff on that issue, but reserved liberty to the defendant's counsel to move to enter a verdict for the defendant upon that issue, if the Court should be of opinion that a ditch could be considered to be a fence within the meaning of the act. *D. F. Jones* obtained a rule nisi in *Easter* term, in pursuance of the leave reserved, and contended, that the jury having found that the ditch was in fact a sufficient fence, in the judgment of the commissioners, the only question was, whether, in point of law a ditch could be a fence within the meaning of this particular act of parliament. It is true that the general inclosure act, 41 G. 3. c. 109. (U. K.) contains certain provisions as to hedges, posts, and rails, &c. but it does not say that nothing shall be considered as a fence, save a hedge, or a regular protection by posts and rails; on the contrary, the 27th section of the general act speaks of inclosures being "*fenced by a mound, brook, or rivulet.*" The strict definition of the term "fence" means nothing more than a sufficient guard to fend or keep off, or shut out. The clause in question in this particular act speaks expressly of a "*river or other sufficient*

sufficient fence." The ditch in question has been immemorially the only fence, in this sense of the word, between the adjoining commons, and also between the adjoining townships, as far as living memory goes. In *Lincolnshire* ditches are very common fences.

1822.

 ELLIS
 against
 ARNISON.

The *Solicitor-General* and *J. Parke* now shewed cause. A fence within the meaning of this act of parliament must be taken to be some better protection than a mere ditch. The sides of the ditch may fall in, or be trodden by cattle, so as very shortly to be no barrier. Some guard elevated above the surface of the ground should at least be required. [*Best J. Callis*, in his *Reading on Sewers*, p. 63., mentions ditches as one of the several matters of defence which the statute of sewers maintaineth; and in p. 81., he speaks of ditches, among the anciently acknowledged fences, dividing lordships, &c.; and refers to a case in the *Year-books*, 12 *Hen.* 4. 7., against the master of *St. Marks*, in *Bristol*, respecting an ancient ditch there; and he instances *Fosdike*, an old ditch in the north-east part of the city of *York*; *Caredike*, in *Lincolnshire*; the *Devil's dike*, on *Newmarket-heath*, and *Wansdike*, in *Wiltshire*, which in some parts divides two counties.] This act of parliament must be construed with reference to the general inclosure act, and by that act it appears, that the legislature considered either a mound or a hedge, or at least posts and rails, to be necessary for an effectual fence. The instances put by *Callis* are of certain ancient and very considerable ditches, and it is too much to infer, from the mention of these particular instances, that any ditch may be a fence. As to the words of the local act, which have been relied on,

CASES IN MICHAELMAS TERM

1822.

*Exus
against
Axiom.*

on, "river, or other sufficient fence," by that must be meant a river, or some other fence, *ejusdem generis*.

D. F. Jones, in support of the rule, was stopped by the Court.

Per Curiam. Whatever provisions the general inclosure act may have very wisely introduced, yet we cannot say that a ditch may not be in legal construction a fence; and if it may be, then the jury in this case have found that this ditch was a sufficient fence, in the judgment of the commissioners. The verdict must, therefore, be entered for the defendant on this issue.

Rule absolute.

*Brown v. Tappin & Co. 1 M. & W. 119.
Wilson v. Vincent & Co. 1 M. & W. 132.*

Wednesday,
November 20th.

HOLMES against HIGGINS.

A number of persons associating together, and subscribing sums of money for the purpose of obtaining a bill in parliament to make a railway, are partners in the undertaking; and therefore a subscriber, who acted as their surveyor, cannot maintain an action for work done by him in that character on account of the partnership, against all or any one of the other subscribers.

IN September, 1820, notices were given of an intended application to parliament for leave to bring in a bill for making a railway from *Womersley* to the river *Dun*, in the county of *York*, which notices were given by the plaintiff, describing himself as agent for the intended bill. In December, 1820, a subscription was commenced for the purpose of passing the bill and making the railway; and between that time and the 27th of January following, including the latter day, several persons subscribed to the undertaking, and amongst others the plaintiff subscribed for two shares of 50*l.* each, and the

defendant

defendant for one. On the 27th *January* a solicitor to the business was appointed, and was directed to adopt such measures as were necessary to obtain an act of parliament during the ensuing session, for the above purpose; and on the same day the plaintiff was appointed agent to the company of subscribers, and assistant to the solicitor. These appointments were made at a meeting of the subscribers on the 27th *January*, at which the defendant acted as chairman, as he did at several other meetings, both before and after. A bill was brought into parliament the following session, and met with considerable opposition, and was ultimately withdrawn. The money sought to be recovered in the action was for business done and money paid by the plaintiff, as agent to the subscribers to the said undertaking. This cause had been referred to a barrister, who by his award found that the defendant was indebted to the plaintiff in the sum of 324*l.* 15*s.*; but delivered to the parties with his award the following certificate: "As it is my wish that the defendant should not be precluded by my award from taking the opinion of the Court of King's Bench, if he shall think proper to do so, upon the objection submitted to me by his counsel, to the right of the plaintiff to maintain the action against the defendant, I certify that it was proved before me, that the plaintiff and the defendant were subscribers to and shareholders in the undertaking, for the benefit of which the work and labour was performed and the expences incurred by the plaintiff, which formed his demand in the action."

F. Pollock having in last term obtained a rule nisi for setting aside this award,

Brougham

1822.

———
Holt vs
Holt vs
Holt vs

1822.

HOLMES
against
HIGGINS.

Brougham now shewed cause. Here the parties were not partners or shareholders until a bill was obtained. The action is brought not for work done in the course of the partnership, but previously to the commencement of it, and therefore the action is clearly maintainable.

ABBOTT C. J. This is the case of a number of persons jointly associated together for a common purpose. The plaintiff and defendant were both members of the association. This action is brought against the defendant, who acted as chairman at the meeting, when the work done was probably ordered; and he might have pleaded that he undertook jointly with the other subscribers. The members of the association were therefore partners. Now it is perfectly clear that one partner cannot maintain an action against his co-partners for work and labour performed, or money expended on account of the partnership. I am of opinion, therefore, that the plaintiff cannot support this action either against the defendant, who was chairman of the meeting, or against the body of subscribers at large. The rule for setting aside the award must therefore be made absolute.

Rule absolute.

1822.

*See Barber v. West. 1. 2d. 2d. 574.*WEST *against* ANDREWS.**D**EBT on 55 G. 3. c. 137. s. 6. for a penalty of 100l.

The first count stated, that the defendant was overseer of the poor of the parish of *Westhampnett*, in *Sussex*, duly appointed in that behalf; and that during the time he retained such appointment, he did *in his own name* provide, furnish, and supply for his own profit, certain goods and provisions for the support and maintenance of the poor of the said parish, for which he was so appointed overseer as aforesaid. The second count stated, that the defendant was a person in whose hands the collection of the rates for the relief of the poor of the said parish was placed, under and by virtue of certain acts of parliament. The third count stated, that he was a person in whose hands the providing for, ordering, management, controul, and direction of the poor of the said parish was placed by virtue of certain acts of parliament. The 4th, 5th, and 6th counts were similar to the 1st, 2d, and 3d, varying only in stating, that the defendant *was directly concerned* in furnishing and supplying for his own profit, certain other goods, &c. The 7th, 8th, 9th, 10th, 11th, and 12th counts, varied in stating, that the supply was for the use of a certain work-house, of and belonging to the said parish of *Westhampnett* amongst other parishes, for the support and maintenance of amongst other poor being in the said workhouse, the poor of the said parish of *Westhampnett*. The 13th count stated, that the defendant was a person amongst others in whose hands the providing

A guardian of the poor, appointed under 22 G. 3. c. 83. is within the 55 G. 3. c. 137. s. 6., notwithstanding the former act, s. 42., imposes a penalty for the supply of the provisions for the poor by such guardians.

Where a count stated that *A. B* supplied the poor of the parish of *W.* with provisions, and the evidence was, that he supplied the poor of the parish of *W.* and other parishes in a workhouse: Held, first, that it was no variance, the proof being larger than the allegation. Secondly, that, the objection as to a variance between the allegation of a supply of the poor and the proof of a supply of the poor in the workhouse, not being taken at nisi prius, could not be afterwards available.

for,

1822.

WEST
against
ANDREWS.

for, ordering, controul, and direction of the poor of the united parishes of *Westhampnett, Borgrove, Midlavant, and West Stoke*, was placed by virtue of certain acts of parliament; and that the defendant in his own name, provided, &c. certain goods for the support and maintenance of the said united parishes. The 14th count stated, that he was directly concerned in providing, &c. goods for the support and maintenance of the said poor of the said united parishes, &c. The 15th and 16th counts stated the supply to be for the use of a certain workhouse, of and belonging to the said united parishes, &c. for the support and maintenance of the poor of the said united parishes, &c. The defendant pleaded the general issue. At the trial at the last *Lent assizes* for the county of *Sussex*, before *Wood B.*, it appeared that the defendant was guardian of the poor of the parish of *Westhampnett*, and that the poor of that parish, together with the poor of four parishes, including those mentioned in the declaration, were jointly maintained in a workhouse, but the parish of *Westhampnett* was regularly united according to the provisions of 22 G. 3. c. 83. s. 43. with only one of those parishes. The supply of the provisions in question was to the master of the workhouse, who, in 1820, bought of the defendant four sheep for the use of the poor, and paid him for them. The master of the workhouse had a contract for providing for the poor at so much a head, and found all the meat; &c. The learned Judge was of opinion, that this was a case within the statute pursuant to the decision of this court in *West v. Andrews (a)*; and the plaintiff obtained a verdict for one penalty which was entered on the third

(a) 5 B. & A. 328.

count. *Marryat*, in *Easter* term last, obtained a rule nisi for entering a nonsuit, on the ground that the evidence was not applicable to that count, or to any other count in the declaration, the supply being in fact for the poor of the united parishes in the workhouse, and only four parishes being stated as united in the declaration, whereas the proof was either of a legal union of two, or an union de facto of five parishes.

1822.

West
against
Andrews.

Gurney and *Long* were to have shewed cause, but the Court called upon

Marryat and *Courthope* to support their rule. There is a fatal objection to the plaintiff recovering in this case. The defendant is appointed a guardian of the poor under 22 G. 3. c. 83. (*Mr. Gilbert's act*); and by the 42nd section of that act, a particular penalty of 20*l.* is given in case any guardian supplies the workhouse with provisions. The proper mode of proceeding was, therefore, to have convicted him under the authority there given, and he does not come within the 55 G. 3. c. 167, s. 6. For that act was confined to overseers of the poor only; and though that act speaks of "parish or parishes, &c." yet the word "parishes" may be intended to extend its operation to cases where, by mutual agreement, or under the provisions of some local acts of parliament, parishes may join in maintaining their poor, under the superintendence of the ordinary overseers. The word "guardians" is not mentioned at all in the 55 G. 3. c. 137., and there was no necessity for including them, the mischief being clearly provided for by the 22 G. 3. c. 83. s. 42. Here the supply can scarcely be considered as within the mischief, being only a sale
to

1822.

WEST
against
ANDREWS.

to the master of the workhouse, who had a contract, and who it appears from the 22 G. 3. c. 83. is not appointed by the guardians, but by the justices of the peace. [*Bayley, J.* He is appointed by the justices out of a list of persons recommended by the guardians. *Abbott C. J.* This point has been already once decided in this very case by this court]. (a) Supposing that to be so, there is no count of this declaration sustained by the evidence. As to the counts in which the defendant is charged as a person having the direction of the poor of the four united parishes there mentioned, it is sufficient to say, that the union, as alleged, was not proved. The parish of *Westhampnett* was legally united with one of them; and five parishes, in fact, sent their poor to be maintained in this workhouse. In either event there was no union of four parishes. Then, as to the remaining counts, undoubtedly the plaintiff's counsel exercised a sound discretion in entering the verdict on the third. But even that count is not proved. It alleges, in substance, that the defendant was a person in whose hands the providing for of the poor of the parish of *Westhampnett* was placed, and that he did in his own name provide, for his own profit, certain goods for the support of the poor of the said parish. Now it appears, first, that the defendant was entrusted with the providing for the poor not of *Westhampnett* alone but of that and other parishes. His character is, therefore, not properly described. And, 2ndly, the supply stated is for the poor of *Westhampnett* alone, whereas it was for them and others. And even supposing the Court should think it was for them, inter alios, and is,

(a) 5 B. & A. vol. v. 328.

therefore,

1822.

 WISE
 against
 ANDREWS.

therefore, proved, still the proof at all events is, that it was for them in the workhouse, which is a distinct offence, specified in the 55 G. 3. c. 137. s. 6, and the count ought to have been framed accordingly. It is true, this last objection was not taken at the trial; but it appears to be warranted by the evidence, as reported by the learned judge.

ABBOTT C. J. In this case it is clear, that if the evidence given at the trial be sufficient to sustain any one of the counts of the declaration, there ought not to be a nonsuit entered. The first objection is, that this was provided for, and must fall under the 22 G. 3. c. 83. s. 42. But if the 55 G. 3. c. 137. s. 6. does not extend to a case like the present, a great many words in it would be altogether insensible. For that clause speaks of persons having the providing for, ordering, management, controul, or direction of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places. It therefore clearly extends to persons having the controul of the poor in more parishes than one, and applies, as it seems to me, to the present case. The next objection is, that the character of the defendant is not properly described. He is described in the third count as a person in whose hands the providing for, ordering, management, controul, and direction of the poor of the parish of *Westhampnett* was placed; how is that allegation sustained? It appears, that under *Gilbert's* (a) act, where more parishes than one are united, every guardian of the poor, appointed under that act, has and is invested with all the powers and authorities

(a) 22 G. 3. c. 83.

1822.

~~West~~
West
against
Anderson

given to overseers of the poor by any act or acts of parliament, and is to all intents and purposes, except with regard to the making and collecting rates, an overseer of the poor for the parish for which he is appointed guardian. If then this defendant was lawfully appointed guardian of the poor of the parish of *West-hampnett*, he is a person in whose hands was placed the controul of the poor of that parish for which he was so appointed guardian. The objection, therefore, that his character is improperly described, cannot prevail. The last objection is, that in the third count the supply is stated to have been for the support and maintenance of the poor of the said parish; whereas by the proof it appears to have been for their support and maintenance in the workhouse, and it is urged that as the 55 G. 3. c. 137. s. 6. describes these as two distinct classes, the allegation should have strictly conformed to the proof. I am by no means satisfied that this objection, even if taken at *nisi prius*, could have prevailed. But I am clearly of opinion, that a mere formal objection of this sort, if not so taken, cannot be available afterwards. I think, therefore, that all the objections are insufficient, and that this rule must be discharged.

Decided in favour of the plaintiff.

BAYLEY J. The 55 G. 3. c. 137. s. 6. seems to have been intended as a general provision, and the legislature could not have meant that there should be one rule for parishes united under 22 G. 3. c. 83., and another in cases of parishes not so united. It may be true, that this case would have fallen under *Gilbert's* act, previously to 55 G. 3., but the latter statute, when passed, contained a general provision, within which, this

this case, if not excepted, would fall. I can see no reason for any such exception being made, and in the absence of any express exception, it seems to me that no exception can be implied from *Gilbert's* act. I am also of opinion, that a guardian appointed under 22 G. 3. is clearly a person having the ordering, management, controul, and direction of the poor of the parish for which he is appointed, and that he falls under the provisions of the 55 G. 3. The guardians have the power of recommending the master of the workhouse, and may make agreements with respect of the diet of the poor over which they are to exercise a strict controul. It is the duty, therefore, of each of them to take care that wholesome food is supplied. Now all these objects will be defeated, if the guardian, who is to inspect the conduct of the governor, supplies the workhouse with provisions. The case, therefore, is clearly within the mischief to be remedied. As to the objection that the declaration does not sufficiently describe the persons for whose care and support the goods were supplied, it seems to me that the allegation is substantially proved, for if a person supplies the poor of any parish, it is immaterial whether he supplies them in or out of a workhouse; and if he supplies a workhouse which contains the poor of the parishes, *A.*, *B.*, *C.*, and *D.*, he does in fact supply the poor of each of these parishes. This rule must therefore be discharged.

1822.

Went
against
Answerers

HOLROYD J. I am of the same opinion. The 55 G. 3. c. 137. is not confined to cases not falling under *Gilbert's* act. The words seem intended to include cases like the present, and we ought to give them a liberal construction, so

1822.

West
against
Andrews.

as to remedy the mischief contemplated. It is contended, that inasmuch as this defendant was only guardian of the poor, he was not charged with the maintenance of the poor of this particular parish, and that the allegation to that effect in the declaration is not proved. It appears in fact, that he had a controul over the maintenance of the poor of the parish. And as to the description of his character in the declaration, it is sufficiently proved by the evidence; for in pleading it is not necessary that the allegation should be as extensive as the proof. Where a prescription is pleaded for a right of common for sheep, and the proof is of a right for all commonable cattle, it is sufficient (*a*); and so here the allegation is, that he had the ordering and direction of the poor of one parish; and the proof is, that he had the ordering and direction of the poor of that parish and others. As to the third objection, I agree with my Lord Chief Justice, that it not being taken at the trial it cannot prevail now.

BEST J. concurred.

Rule discharged.

(a) See *Bushwood v. Pond*, Cro. El. 722. *Bruges v. Scarl*, Carth. 219. *Bailiffs, &c. of Tewkesbury v. Ericknell*, 1 Taunt. 142.

1822.

REX *against* The Bailiffs and Corporation of
EYE.

Saturday,
November 23d.

THE affidavit in this case set out the charter 9 W. 3., by which former charters of *Hen. 6. Hen. 8.* and Queen *Eliz.* were revived and restored; and the bye-law of the 8 *Eliz.* as in *Rex v. The Bailiffs and Corporation of Eye*, ante, vol. iv. p. 271. It also stated, that *G. Twitchett* had been resident in the town and borough for one whole year, on the 27th *October*, when one of the great courts was held by the bailiff, and that he had attended, requested, and demanded to be admitted to his freedom; that he had carried on the trade and business of a tallow-chandler for six years, and that he had always been ready to take up his freedom, and comply with the laws and customs of the borough; that he had been fined and amerced by the court, or views of frankpledge held by the bailiff's of the borough, for carrying on his trade of a tallow chandler within the borough, without being admitted to his freedom, contrary to ancient custom.

A bye law of a corporation directed that, upon the happening of any vacancy in the number of twenty-four common council, such vacancies should be filled by the freemen inhabiting the town; and that a court should be holden once every year, at which it should be lawful for the bailiffs to admit to the freedom of the town such persons of good fame as had been resident therein for one whole year: Held, that this bye law did not give to every such person who had been so resident for that period an absolute right to be admitted to the freedom of the borough; and the Court refused a manda-

Scarlett moved for a mandamus to admit him to his freedom. In *Rex v. Havering, attē Bower (a)*, and *Rex v. the Mayor and Jurats of Hastings*, this Court

gave a mandamus to the bailiffs to admit such a person, although it appeared that he had been fined for carrying on a trade within the town without being admitted to his freedom.

(a) 5 B. & A. 691, 692.

1822.
 The King
 against
 The Bailiffs and
 Corporation of
 Eke.

decided that words of permission in a charter, respecting a matter which is a public benefit, were imperative. Now here, inasmuch as an unrestrained trade is a great public benefit, the words "it shall and may be lawful," used in this bye-law, must be construed to be imperative on the corporation to admit all such persons to their freedom, as are described in the bye-law; for otherwise, they may be prevented from exercising a trade within the borough.

ABBOTT C. J. The words "it shall and may be lawful," in acts of parliament, and other instruments, are obligatory or not, according to the subject matter with respect to which they are used. This is the rule laid down by *Chambre J.* in *Cook v. Tower (a)*. When used in charters, they have generally been construed as giving an option to do or not to do the thing respecting which they are used. In the cases which have been cited, the words were not precisely the same as in the present case. In *Res v. Havering atte Bower*, the words were, "that the steward and suitors of the manor court should have power and authority to hear and determine all causes arising within the manor, although the same exceeded forty shillings." The holding of such a court was an obvious and undoubted benefit to the suitors of the manor, and therefore, in that case, it was held to be obligatory on them to hold the court. Here, however, the words "it shall and may be lawful," occur in a bye-law, and relate to the description of persons who may be admitted freemen, the charter itself being silent on that subject. It is impossible to suppose that the corporation, who themselves made this bye-law, should have intended, by using the terms "it

(a) 1 *Tunst.* 377.

shall and may be lawful," to make it obligatory upon them to admit to their freedom all the persons therein described. Here the words occur only in a bye-law, and I think they are not obligatory. As to the custom respecting the freedom of trade, it is unnecessary to decide whether, under these circumstances, it be valid. This rule must be refused.

1822.

—
The King
against
The Bailiffs and
Corporation of
Ely.

Rule refused. (a)

(a) See *Mayor, &c. of York v. Wilberk*, 4 B. & A. 438.

Ex parte ADDIS.

Monday,
November 25th.

PHILLIPPS had obtained a rule, to shew cause why a writ of habeas corpus should not issue, directed to the keeper of the gaol of the county of *Leicester*, to bring up the body of *Joseph Addis*, for the purpose of discharging him out of custody, on the ground that the warrant of commitment was defective. It appeared, that on the 4th of *April*, 1822, two justices made an order of filiation, which recited that complaint had been made to them by the overseers of *S.*, as well on their oath, as on that of *A. S.*, late *A. G.* single woman; that the said *A. G.* was delivered of a bastard child on the 29th *November*, 1808, at the said parish, and that the said child was chargeable to the said parish from that time till *April* 16th, 1812; and that *J. Addis* did beget the said child, and that the child soon after the 29th *November*, 1808, was filiated by the said *A. G.*, and that the said *J. Addis* did then abscond. It then recited that the defendant was present on the 4th *April*, 1822, before the justices in pursuance of their warrant, who adjudged him to be the reputed

Where an order of bastardy has been made, and the time for appeal past, it cannot be enforced under 18 *Eliz. c. 3.*, but the magistrate must proceed under 49 *G. 3. c. 68. s. 3.* by commitment for three months.

1822.

Ex parte
Addis.

father, and thereupon ordered him to pay 8*l.* (being the expences incident to the birth and the lying-in of the said *A. G.*, and the costs of apprehending and securing him the said *J. A.*, and of the order of filiation;) and the further sum of 17*l.* 10*s.*, being after the rate of 2*s.* per week for three years and nineteen weeks, viz. up to the 6th of *April*, 1812, on which day the bastard child died, which sum had been expended in the maintenance of the said bastard child. The justices on the same day, in consequence of the defendant having refused to pay, or to find surety for the payment of the sums mentioned in the order, committed him until those sums should be duly paid, or until he should be otherwise delivered by due course of law. At the sessions held *April* 15th, 1822, no appeal was entered against the order, but the sessions thought the commitment illegal on the face of it, and discharged the defendant. On the 8th *September*, 1822, the defendant was again brought before the magistrates who had made the order, and they then committed him again to prison. The warrant of commitment recited the order of filiation; and that the defendant had not paid, or caused to be paid, the said sums of 8*l.* and 17*l.* 10*s.*, and did still refuse so to do. And thereupon, they adjudged him to be guilty of the offence aforesaid against the provisions of the 18 *Eliz. c. 3.*, and therefore, under the directions of the aforesaid statute, committed him to ward in the common gaol there, to remain without bail or mainprize, except he should put in sufficient surety to perform the said order, or else personally to appear at the next general quarter sessions of the peace to be holden for the county of *Leicester*; and also to abide such order as the justices of the peace there assembled, or the more part of them, then and there should take in that behalf,

behalf, &c. In moving for the rule nisi, two points were made. First, that the order of filiation recited in the warrant was bad, being for by-gone maintenance. Secondly, that the magistrates had no power to commit under the 18 *Eliz. c. 3.*, but were bound to commit for three months under 49 *G. 3. c. 68. s. 3.* On shewing cause the first objection was given up, the cases *Regina v. Smith (a)*, *Regina v. Odam (b)*, *Rex v. Moravia (c)*, *Rex v. Fox (d)*, and *Rex v. Hill (e)*, *Rex v. Hartington (f)* being cited as authorities to shew that an order for by gone main tenance is good.

1822.

Ex parte
Adm.

Marriott then shewed cause on the second objection. The proceeding under the 18 *Eliz. c. 3.* is right, for the 49 *G. 3. c. 68.* does not extend to this case. This is neither the case of an order of filiation made at sessions or confirmed by the sessions, nor is it a case where no appeal has been made against the order, within the meaning of the third section of that act; for it is to be observed, that the 18 *Eliz. c. 3.* does not expressly give any appeal. The appeal arises incidentally from the form of the commitment, which is to continue, except the party give surety, either to perform the order of filiation, or to appear at the sessions to abide their order, or, if they make none, then to perform the original order. If, then, a party be committed, and there be no appeal, he must continue in prison, unless he finds sureties. Here, however, the sessions have discharged him, which makes this case different from those enumerated in the 49 *G. 3. c. 68. s. 3.* The case falls within the 4th section of that act, by which all the

(a) 1 *Bott. pl.* 667.(b) *Salk.* 124.(c) 1 *Bott. pl.* 680.(d) 1 *Bott. pl.* 682.(e) 1 *Sid.* 326.(f) 4 *M. & S.* 559.

1822.

Ex parte
Amdis.

powers of the 18 *Eliz. c. 3.* are expressly made applicable; and clearly, as to the sum of 8*l.*, the only mode of proceeding is under the 18 *Eliz. c. 3.*

Phillipps, contra. Supposing the order of filiation to be good, which is very questionable, the only mode of proceeding is under 49 *G. 3. c. 68.*; for in this case the time for appeal against the order is passed, and then it comes within the third case mentioned in the 49 *G. 3. c. 68. s. 3.* viz. of an order against which no appeal has been made. The 18 *Eliz. c. 3.* only applies to cases of orders against which the party may appeal. He was then stopped by the Court.

Per Curiam. If the original order of filiation dated 4th April be valid, it is clear that the party could only get rid of it by an appeal, which he has not made. If so, then it is clear, that all the subsequent proceedings, in order to enforce the payment of the maintenance due by that order, must fall under the 49 *G. 3. c. 68. s. 3.* If the original order be on the face of it invalid, then, whether appealed against or not, it cannot now be enforced. In either event, the present commitment is bad. It has been contended, however, that it is good, as far as relates to the sum of 8*l.* But if a man be committed for the nonpayment of two sums, one of which is not due, the warrant of commitment is bad for the whole. The rule must, therefore, be made absolute.

Rule absolute. (a)

(a) In the cases cited, where an order for by-gone maintenance has been held sufficient, it did not appear but that the children were still alive and chargeable to the parish. Here the child was dead when the order of filiation was made. It may be doubtful whether such an order, purporting

1822.

GLENVILLE *against* HUTCHINS.

Monday,
November 25th.

ASSUMPSIT by the plaintiff for board and lodging, liquors, money lent, &c. The whole sum sought to be recovered was 19*l.* 19*s.* In the particulars of demand the board and lodging was charged at the

A defendant was held to bail for a sum of money claimed to be due to the plaintiff for board and lodging, charged

at the rate of 2*l.* 2*s.* per week. At the trial, it was proved that the plaintiff had expressly agreed to charge at the rate of 1*l.* 1*s.* per week only, and a verdict was found for a sum less than that, for which the defendant was held to bail. A rule nisi having been obtained for allowing the defendant his costs under the 43 G. 3. c. 46. s. 8., the plaintiff, in answer thereto by his affidavit, denied that there was any such agreement, and swore that the whole sum claimed was justly due to him; under these circumstances, the Court acted upon the testimony given at the trial, and made the rule absolute.

porting to be made after the death of the child, would be sufficient. The 49 G. 3. c. 68. s. 2. seems to the contrary; for where a putative father has been committed before birth, till he shall give security to abide a future order, it is expressly enacted, that the sessions shall wholly discharge him, in case a certificate of two justices be sent to them, either that an order has been made, or that such order was not then requisite to be made, on account of the death of the child born a bastard. And the third section gives the magistrates power to commit on the complaint of one of the overseers of the place liable to the maintenance, or of the place where such bastard child shall then be, which seems rather to refer to children then alive. And the 18 Eliz. c. 3. states, that the justices shall take order for the punishment of the father and mother, and the relief of the parish, and the keeping of the child. Besides, it must appear by the order that the child is chargeable, or likely to be so. *Res v. Nelson*, 1 Fenist, 37., and in *Res v. Matthews*, 2 Salk. 475., where the Court refused to quash the order for the defect, in not so stating it on the face of it, the reason given for the judgment is, "that every bastard child is likely to become chargeable;" which observation can only apply to living children. Here the death is stated on the face of the order. The expences incident to the lying in, &c. stand upon a different foundation from the weekly payments towards the maintenance of the child. For these are given by the 49 G. 3. c. 68. s. 4., and only depend on the contingency of the child being born alive. See *Res v. De Brouquens*, 14 East, 277.

rate

1822.

—
 GLENVILLE
 against
 HUTCHINS.

rate of 2*l.* 2*s.* per week for six weeks. The defendant was arrested for 15*l.*, and pleaded the general issue and infancy, to which the plaintiff replied, that the board and lodging were necessaries. The plaintiff obtained a verdict for 6*l.* 6*s.* 8*d.*, the defendant having proved, that, in a conversation between the plaintiff and one *Garland*, who was called as a witness, the former had stated that he had expressly agreed to board the defendant at 1*l.* 1*s.* per week. A rule nisi having been obtained for allowing the defendant his costs, under the 43 G. 3. c. 46. s. 3., upon an affidavit by the defendant, stating these facts, the plaintiff, by his affidavit in answer, swore that the whole sum mentioned in his bill of particulars was justly due to him, and denied that he ever had such conversation as deposed to by *Garland*, or that he had ever agreed to board and lodge the defendant at 1*l.* 1*s.* per week; and both he and his solicitor swore, that they had never heard of the supposed agreement before the trial, and two letters written by the defendant's attorneys to the plaintiff's attorney, previously to the commencement of the action, were annexed to the affidavit, in neither of which was it intimated that the account delivered was incorrect; and in the latter they expressly stated that the defendant intended to settle that account fairly, that he had expended some small sums on account of the plaintiff, and that he had written to the country to ascertain their precise amount.

Marryat and *Walford* shewed cause. The plaintiff was precluded from recovering for many of the items in the account, because they were not necessaries, and the
 plea

plea of infancy was, therefore, an answer to the action as to them. The plaintiff, however, at the time of the arrest, had a reasonable and probable cause for arresting him for the sum made up of those items. For he did not then know of the defendant's infancy. The only question therefore is, whether he had a probable cause for arresting the defendant for the board and lodging, at the rate of two guineas per week. Now the plaintiff not only positively denies the agreement, but it is sworn, both by himself and his solicitor, that no such agreement was ever mentioned before the trial, and two letters written by the defendant's attorney, before the commencement of the action, are annexed to the affidavits, in which the account is not only not disputed, but they state that the defendant only wished to settle it fairly, and to deduct some small sums which he had expended on the plaintiff's account.

1822.

GLENVILLE
against
HUTCHINS.

Gurney and Bayly, in support of the rule. The question certainly depends upon the sum which was to be paid for the defendant's board and lodging. Now the facts stated in the plaintiff's affidavit as to the agreement, are inconsistent with the evidence given at the trial; and it is safer for the Court to be guided by the testimony of a disinterested witness than that of a party in the cause.

ABBOTT C. J. It appears by my note of the evidence given at the trial, that the agreement was proved as stated in the defendant's affidavit. Now it would be most dangerous to permit the testimony of a party in a cause to be received in contradiction of
a dis-

1822.

GLASVILL
against
HUTCHING.

a disinterested witness. The Court must be guided by the evidence given at the trial, and by that it appears that there was an agreement to charge only one guinea per week for the board. The plaintiff, therefore, had not any reasonable or probable cause for holding the defendant to bail for 15*l*. The rule must, therefore, be made absolute.

Rule absolute.

Monday,
November 25th.

LEE *against* SHORE and Others.

Where a plaintiff in an action for goods sold and delivered, proved the possession of the goods by himself, and their removal by the defendants; and it appeared that the goods consisted of spar lying on the lands of *A.*, and that the plaintiff claimed under *A.* by a written agreement not produced: Held, that this was not sufficient proof of title to the goods, from which a contract between the parties could be implied.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before *Best J.* at the last Spring assizes for *Derbyshire*, it appeared that the action was brought to recover the value of a quantity of spar, taken and used by the defendants, and which the plaintiff alleged to be his property. Spar is part of the refuse dug from lead-mines, together with the ore, and after being separated from it, is thrown upon the land adjoining the mine. The land, whence the spar in question was taken, had been for more than 20 years occupied by one *Bond*, as tenant from year to year under *W. Hurd*; at the time of the letting to him, a lead-mine in the farm was specially reserved, but the spar was not mentioned. In 1814, the plaintiff applied to *Hurd* for a lease of the spar from time to time thrown upon the land occupied by *Bond*, and an agreement respecting it was made between them, by letters, which were afterwards stamped, but were not produced.

The

The plaintiff then proved, that he had sold the spar to several persons who carried it away from the land, without any interference by *Bond*; but no contract was proved to have been made between the plaintiff and defendants. For the latter it was objected, 1st, That the plaintiff had not proved that the spar was ever let to him; and, 2dly, That no evidence had been given to shew that *Hurd* had power to let the spar to the plaintiff, that being a part of the land which was let to *Bond*. The learned Judge thought the objections valid, and was about to nonsuit the plaintiff, but at the request of his counsel left the case to the jury, and desired them to say, 1st, Whether the plaintiff had proved any title to the spar; and, 2dly, Whether *Bond*, the tenant of the land, had relinquished his right to it, if he ever had any. The jury found a general verdict for the defendants. In *Easter* term, *Clarke* obtained a rule to shew cause why the verdict should not be set aside and a new trial had: and now,

1822.

Let
against
Shew.

Denman, (with whom was *N. Clarke*,) shewed cause. No evidence was given at the trial to prove the plaintiff's title to the spar. The only legitimate evidence for that purpose was the stamped agreement entered into between him and *Hurd*, and that was not produced. Neither was it shewn that any contract, for the sale of the spar, had been made between the plaintiff and defendants. The plaintiff, therefore, could not be entitled to a verdict. Besides, no person but the tenant of the land could give the defendants leave to enter upon it; and therefore, even if the plaintiff had shewn the agreement made between him and *Hurd*, he could

1822.

 LEE
 against
 SHORE.

could not have conferred upon the defendants a complete title to the spar, for *Bond* might at any time have prevented them from carrying it away. Perhaps, indeed, the plaintiff should have been nonsuited, but as the case was left to the jury at his own election, he cannot now complain.

Clarke and Reader, contra. Although the agreement between *Hurd* and the plaintiff was not produced, still possession was proved in the latter, and various acts of ownership exercised by him, which made out a *prima facie* title to the spar. As to the objection that *Bond* might have interfered and prevented the defendants from taking away the spar, it is a sufficient answer, that he did not do so; they are therefore bound to pay for that which they took. Suppose a landlord were to enter upon his tenant, cut down a tree and sell it; the purchaser having carried away the tree, must pay the price of it, although liable to be sued as a trespasser by the tenant. The plaintiff then, having proved a *prima facie* title to the spar, and that the defendants took it, was entitled to a verdict. Whether or not the tenant of the land had relinquished his right to the spar, if he ever had any, was a question for the Judge, and ought not to have been left to the jury.

ABBOTT C. J. This was an action for goods sold and delivered, which is founded on contract. Now here, there was no express contract, and the question is, whether any can be inferred. The only evidence from which we are called upon to draw such an inference, is a *prima facie* case of possession by the plaintiff, and

1822.

 LEE
against
 SHORE.

and the removal of the spar by the defendants. But where the owner of property which has been taken away by another, waives the tort, and elects to bring an action of assumpsit for the value, it is incumbent upon him to shew a clear and indisputable title to that property. Did the plaintiff do that in the present case? He was not owner of the land, but claimed under him, by virtue of a written contract, which was not given in evidence. Had it been produced, it might perhaps have explained those acts of ownership which were proved on behalf of the plaintiff, and have shewn that he had a right to the spar upon part of the land in question, and not upon the whole. But at all events, whatever the plaintiff's rights may be, as he did not produce the written contract, which was the proper evidence of them, I am of opinion that he did not make out a case which entitled him to a verdict. I am not, however, satisfied that the question was properly left to the jury, and therefore think that the rule for setting aside the verdict should be made absolute; but that it must be done subject to the condition, that a nonsuit be entered.

HOLROYD J. (a) I am of the same opinion. Much stress has been laid, in the course of the argument, upon the plaintiff's possession of the spar. Now, although in actions of trespass it is sufficient for the plaintiff to prove possession without shewing how he obtained it, yet there is a great difference between cases of that description and the present, which is an action of assumpsit. If, indeed, any express contract between

(a) Bayley J. was at Chambers.

1822.

—
 Lee
 against
 Moore.

the parties had been shewn, the question of right could not have been entered into; but no evidence of that kind was given: the plaintiff's case rested entirely upon the fact of the spar having been taken by the defendants. Then it is said, that acts of ownership were exercised by the plaintiff; but the evidence leaves it extremely doubtful how far they extended: it appears, too, that the plaintiff's right, whatever it was, arose out of a written agreement, which was not produced; he did not, therefore, prove a right of possession, as well as actual possession, which it was incumbent upon him to do, in order to sustain this action. For these reasons, I think that a nonsuit should be entered.

BEST J. My opinion was as decided at the trial as it is now, that the plaintiff should be nonsuited; but as the case had been tried once before, and as the plaintiff's counsel pressed me strongly to leave it to the jury to say, whether, although the lease was not proved, the plaintiff was not in possession of the spar, and whether *Bond* the tenant might not be presumed to have relinquished his right, I thought, that, by complying with their wishes, I should put a speedier end to litigation. Both the objections taken by the defendants' counsel are, in my opinion, valid. When there is no contract of sale, but the plaintiff stands on his right to the property which has been taken, and proceeds against a defendant on an implied undertaking, the plaintiff must make out a clear exclusive right, both to the property and possession; otherwise, after a defendant has paid for the goods, he might be sued in trespass for taking them by another party. In this case, without the lease, the plaintiff proved no right
 whatever;

whatever; for supposing him to have had the possession one day, his right to it might have been determined the next. If possession had been ever so clearly proved, it was necessary to see the instrument under which the plaintiff claimed it, to know whether his right continued at the time the spar was taken. But the tenancy of *Bond* put it out of the power of the owner of the land to grant a right to the possession of this spar to the plaintiff. The possession of every thing belonging to the land passes to the tenant, unless there be a reservation by the custom of the place (as is often the case, in countries where there are mines), or an express reservation in the lease. Although the tenant would have no right to carry away the spar, he might use it on the farm; and, during his lease, might prevent his landlord from removing it. There would be no necessity of reserving a right of entry for particular purposes, as to cut trees, or kill game, if the tenant's right of possession did not exclude the landlord. I am not aware of any right the landlord has to enter on the demised premises without an express reservation, except to view waste or demand rent. In 10 *Viner's Abr. tit. Estate, (B. b. 14.)* 3. it is said, if the lessor, after having leased his lands, without excepting the trees, grants omnes boscos et arbores, nothing passes, for these passed to the tenant by the lease. Although the case was, at the request of the plaintiff's counsel, left to the jury, and a verdict taken, as the rest of the Court think there should now be a nonsuit, the rule must be drawn up to enter a nonsuit.

1822,

 LEX
 agatut
 SMOAR.

Rule accordingly.

1822.

Tuesday,
November 26th.

SUMMERS *against* FORMBY.

Where a rule for a new trial is silent as to the costs of the first trial, and the cause is afterwards referred at nisi prius, and determined in favour of plaintiff, he is not entitled to the costs of the first trial.

THIS cause was tried at the *Lent* assizes, 1821, when a special case was reserved for the opinion of the Court. The case being imperfectly stated, the Court, after argument, ordered that if the parties could not agree upon a reference, the rule should be drawn up for a new trial. Nothing was said in the rule as to the costs of the first trial. The cause was taken down to the assizes a second time, but was there referred; and an award was afterwards made in favour of the plaintiff. The Master, on taxation, having refused to allow the plaintiff the costs of the first trial,

Manning now moved that he should review his taxation; and he referred to *Smith v. Haile* (a), in which the party succeeding on a second trial, which was granted, because a special case reserved on the first was imperfectly stated, was held not to be entitled to the costs of the first trial. In that case, the cause was actually tried a second time; but in *Booth v. Atherton* (b), where, under the same circumstances, a new trial was granted, and the defendant, without going to trial, gave the plaintiff a cognovit, it was held that the defendant was liable to pay the costs of the first trial. Now this is an intermediate case between the two, for here the suit is terminated by a reference.

(a) 6 T. R. 71.

(b) *Ibid.* 144.

Per

Per Curiam. This case falls within the rule laid down in *Smith v. Haile*, for the reference was equivalent to a trial; and it has been held to be so, so as to entitle the defendant to costs, where the plaintiff does not recover the sum for which the defendant was arrested, under the 43 G. 3. c. 46. s. 3. (a)

1822.

SUMMONS
against
FOREIGN.

Rule refused.

(a) See *Tidd's Practice*, 1018. 6th ed.

In the Matter of Persons 1822. 1823. 1824.

KITE and LANE's Case.

Wednesday,
November 27th.

LITTLEDALE, on a former day in this term, obtained a rule to shew cause why a writ of *habeas corpus* should not issue, directed to the commander of his majesty's ship of war, *Glocester*, commanding him to bring up the bodies of *Charles Kite* and *Edward Lane*, who were confined on board that ship. The affidavits disclosed these facts: on the 3d of *October* last, a boat, with *Kite* and *Lane* on board, was seized, within the harbour of *Folkstone*, for a breach of the revenue laws. The men were taken on shore, at *Folkstone*, and confined there until the 5th of *October*, when they were again put on board the boat, and taken, together with it, to *Dover*. An information was laid against *K.* and *L.*, before two justices for that place, and separate convictions were drawn up, as follows:

A. and *B.*, found and arrested on board a boat laden with smuggled goods within the harbour of *F.*, which was within a local exclusive jurisdiction, were afterwards taken, with the boat, &c. to the port of *D.*, and convicted before two justices of the town and port of *D.*, pursuant to 45 G. 3. c. 121. s. 7., 57 G. 3. c. 87. s. 5., and 3 G. 4. c. 110.: Held, that the conviction, which only stated that they had been

found and taken on board a boat in the harbour of *F.*, was bad, for not shewing that the justices of *D.* had jurisdiction over the offence.

Semble, that in this case only the justices of the local jurisdiction of *F.* had authority to convict; and that the 45 G. 3. c. 121. s. 7. gives jurisdiction to those justices only who reside near to the first port or place into which any ship, &c. shall be carried, or where any person shall be arrested by virtue of that clause.

1822.

*Kite and
Lane's Case.*

"Be it remembered, that on the 5th day of October, 1822, *Charles Kite*, of the town of *Folkstone*, in *Kent*, fisherman, hath been duly convicted before us; two of his majesty's justices of the peace in and for the town and port of *Dover*, in the said county; for having, on the 3d day of *October*, been found and taken on board a boat in the harbour of *Folkstone* aforesaid, laden, &c." (setting out the offence, evidence, and adjudication, according to the second form given by the 3 G. 4. c. 110.) In pursuance of that adjudication, *K.* and *L.* were afterwards taken on board the *Glocester*. There was no custom-house at *Folkstone*, and smuggled goods seized there were generally taken to *Dover*; but the jurisdiction of the magistrates for the town and port of *Folkstone* extended to the place where this seizure was made, and they constantly took cognizance of offences against the revenue laws, when committed there. The justices of *Dover* had no jurisdiction within the town or harbour of *Folkstone*.

Jervis shewed cause. The magistrates of *Dover* had authority to convict in this case. It must be admitted, that the boat was originally captured within the limits of *Folkstone*; but the captors afterwards took it to *Dover*, together with the prisoners *K.* and *L.*; for the purpose of laying an information against them at that place. The question turns upon the 45 G. 3. c. 121. s. 7., and the 57 G. 3. c. 87. s. 5., which give jurisdiction to two descriptions of magistrates; first, to those residing near to the port or place into which the vessel or boat is carried, and, secondly, to those residing near the place where the parties are arrested. The 3 G. 4. c. 110. has not repealed the former enactments upon this point.

Here,

Here, then, the convicting magistrates had jurisdiction, the boat having been carried into the port of *Dover*. [Bayley J. Admitting the magistrates of *Dover* to have had the jurisdiction contended for, ought not the conviction on the face of it to have shewn that jurisdiction?] That is unnecessary, as the 3 G. 4. c. 110. gives a particular form of conviction, which has been adopted in this case.

1822.

 KITE and
LANE'S CASE.

Littledale, contra. The magistrates of *Dover* had no jurisdiction over the offence in question. The acts which have been referred to authorise seizures on the high seas; and, therefore, when they direct that the information shall be laid before justices residing near the port or place into which the vessel is carried, that must mean the port or place at which the vessel *first* has communication with the land. The magistrates of *Dover*, then, were not within the first class of those to whom authority is given. If it be contended, that they are within the second class, as residing near the place where the parties were arrested, the case of *Talbot v. Hubble* (a) is decisive against them. That was a question on the construction of the 12 Car. 2. c. 23. s. 31., which gave jurisdiction in excise matters to the justices near to the place where the offence was committed; and it was held that county magistrates, although residing near the place where an offence was committed, had no power to act, if that offence were committed within the limits of a local exclusive commission of the peace. The same rule must apply here. The arrest was made within the local jurisdiction of *Folkstone*; the men should, therefore, have been taken before the justices of that place.

(a) 2 Str. 1154.

1822.

KITE and
LANE's Case.

But, secondly, admitting that jurisdiction could be given to the magistrates of *Dover*, by the subsequent taking of the vessel to that place, the fact of its having been taken there should have appeared on the face of the conviction. Something should have been shewn, connecting the offence committed at *Folkstone* with the jurisdiction of magistrates appointed for the town and port of *Dover*. Nothing of that kind is stated; at all events, therefore, the conviction is bad, and this rule must be made absolute.

ABBOTT C. J. Two questions have been raised in this case: 1st, whether the magistrates of the town and port of *Dover* had authority over the subject-matter of the conviction; and, 2dly, whether the conviction is good, inasmuch as that authority is not apparent on the face of it. By the 45 G. 3. c. 121. s. 7. it was enacted, that persons "taken on board of any ship, vessel, or boat, or on land, under the circumstances there stated, should be taken before one or more justice or justices residing near the port or place into which such ship, vessel, or boat should be taken or carried, or near to the place where any such person should be so taken or arrested; and that such justice or justices might hold the party accused to bail, or, if he desired it, send him on board one of his majesty's ships of war." By the 57 G. 3. c. 87. s. 5., after reciting the former enactment, it is provided, that any *such* justice or justices shall have power to hear and decide upon any such complaint immediately, instead of holding the party to bail. Jurisdiction is, therefore, given to the same magistrates by both these acts. Now, it appears by the affidavits in this case, that the persons offending were arrested within the harbour of *Folkstone*; their vessel

was detained there, and they were taken on shore within the local jurisdiction of the magistrates of that place. On a subsequent day, the prisoners were again put on board the vessel, and carried, together with it, to *Dover*. That raises the question, whether persons carried, by the voluntary act of the captors, within a particular jurisdiction, can afterwards, without any apparent necessity, be taken within the limits of another jurisdiction and be there convicted of the offence imputed to them. If that can be done, this great inconvenience will result, that persons arrested under the provisions of the acts in question may be carried from port to port, at the pleasure of the captors, and may at last be convicted at one extremity of the kingdom of an offence committed at the other. I am strongly inclined to think that no such power exists. It is, however, unnecessary to decide expressly upon that point; for I am clearly of opinion, that the conviction itself is bad on the face of it. It is a first principle, as to all acts done by magistrates, that their jurisdiction should appear upon the face of their proceedings. In convictions, the place for which the magistrates act must be shewn; the offence must be set out; and either it must appear that the offence was committed within the limits for which the convicting magistrates are appointed, or facts must be stated which give them jurisdiction beyond those limits. If we hold that to be unnecessary in the present case, we shall give to the statutes which have been cited the effect of repealing the former law upon this subject. Now it does not appear to have been the intention of the legislature to extend the jurisdiction of magistrates; and unless we come to that conclusion, we cannot suppose it to have been intended that a magistrate of one place should

1822.

 KITE and
LANE's Case.

have

1822.

_____ *Moss and
Lawn's Case.*

have jurisdiction over an offence committed in another. I am, therefore, satisfied that this conviction is bad, (notwithstanding the form given by the 3 G. 4. c. 110.,) nothing being stated on the face of it which shews that the magistrates of *Dover* had authority over the subject-matter of the conviction. The rule must therefore be made absolute.

BAYLEY and HOLROYD Js. concurred.

BEST J. I agree with my Lord Chief Justice that these prisoners must, for the reasons that his Lordship has given, be discharged. I am also of opinion, that the magistrates of *Dover* had no jurisdiction in this case. The offence was committed, and the vessel on board of which the prisoners were found was captured, within the harbour of *Folkstone*. At *Folkstone* the prisoners were landed, and confined two days, and were afterwards put on board ship again and carried to *Dover*. The words of the statute which creates this offence, and gives the magistrates jurisdiction over it, require that prisoners shall be conveyed before some *justice or justices residing in or near the port or place into which the ship shall be taken or carried*. I think the import of these words is, that port or place into which the ship shall be *first* carried in which a magistrate can be found to decide on the cases of the men that are taken on board of her. The words "port or place" cannot mean any port to which the ship shall at any time be carried, and must therefore be confined to the first port into which she shall be brought where the thing can be done which is required to be done. If we put any larger construction on the words of the act, we give occasion for delay, which

which must be prejudicial to the prisoner. There were magistrates in *Folkstone*, before whom the prisoners might have been taken; they ought not therefore to have been taken before any other tribunal. Perhaps the case would be different if the ship came within the limits of a port, but went away again, either from stress of weather or other necessary cause, without communicating with the land. It is a settled principle, that penal statutes, and such as create a new jurisdiction, shall receive a strict construction. We have been told that there is no custom-house at *Folkstone*, and that therefore it would be inconvenient to land the goods found on board vessels seized for smuggling. If any inconvenience shall arise from this construction, that may be guarded against by another law. We must put that interpretation on the present law which the rules of construction require; and that is, such as will guard against the abuse of a new and extraordinary power.

1822.

 KITE and
LANE'S CASE.

Rule absolute. (a)

(a) Summary convictions before magistrates being by virtue of a circumscribed and extraordinary jurisdiction, nothing can be intended to aid or extend that jurisdiction. Hence it has been always held necessary that the authority of the convicting magistrates should appear upon the face of their proceedings. *Rex v. Green*, *Cald.* 391. Upon this ground, in *Rex v. Johnson*, 1 *Str.* 261., the conviction was quashed, because it did not appear that it was made by justices of the county where the offence was committed; and in *Rex v. Curden*, 4 *Burr.* 2279., *Rex v. Jeffries*, 1 *T. R.* 241., *Rex v. Stone*, 1 *East*, 636., and *Rex v. Jarvis*, *ib.* 644. n., it was laid down as a general rule, that a conviction must shew that the justices had jurisdiction. In *Rex v. Hazell*, 13 *East*, 139., which was a conviction of a person employed in a manufacture, for refusing to work, the justices had followed the form prescribed by the 41 G. 3. c. 38. That form, which was very similar to those given by the 3 G. 4. c. 110., required that the offence should be set out, but did not expressly require that the place where it was committed should be shewn. The conviction described

1822.

MACPHERSON *against* LOVIE.

An affidavit of debt stated that defendant was indebted to plaintiff, upon a written agreement to marry plaintiff at a time specified, or pay her 1000*l.*, and that he had not done either, although the time had elapsed, and plaintiff was ready and willing to marry defendant, and requested him to marry her: Held, that this was insufficient, as the Court can take nothing by indentment in an affidavit of debt; and here no consideration for the defendant's promise was shewn.

IN this case, the affidavit to hold to bail was made by the plaintiff, and stated "that the defendant was indebted to the deponent in the sum of 1000*l.*, upon and by virtue of a certain memorandum in writing, bearing date *October* 19th, 1821, whereby the said defendant promised deponent, that when he returned in the month of *March* or *April* then next, he would marry the deponent, or pay her the sum of 1000*l.*; that defendant did return in the said month of *March*, and deponent was then ready and willing to intermarry with him; that the said months of *March* and *April* have long since elapsed, yet the said defendant (although often requested,) hath not yet married deponent or paid her the said sum of 1000*l.*"

Marryat moved to discharge the defendant out of custody on filing common bail, on account of the insufficiency of the affidavit to hold to bail. It does not appear by this affidavit, that the plaintiff ever promised

described the offence minutely, but did not state where it was committed. Per Lord *Ellenborough*, "It must appear upon the face of the conviction that the offence was committed within the county of the justices who convict the defendant, without which they can have no jurisdiction. The statute never meant to give those magistrates jurisdiction to inquire of this offence throughout every county; the allegation, therefore, that the offence was committed at some place within the county of which they were justices, is essential to give them jurisdiction." See also *Rex v. Edwards*, 1 *East*, 278.

to marry the defendant. The promises, therefore, were not mutual; nor is any consideration whatever shewn for the defendant's promise; and without that, the affidavit is insufficient. *Taylor v. Forbes.* (a) The allegation, that plaintiff was ready and willing to marry defendant, amounts to nothing at all; it should have been shewn that she promised to do so at his request. *Durnford v. Messiter.* (b)

1822.

MACPHERSON
against
LOVIE.

Adolphus shewed cause, in the first instance. No case goes the length of supporting this application. In the cases cited, there was a total absence of any cause of action. The question did not turn upon any defect in the affidavit, which, if found in the declaration, might entitle the defendant to a verdict; but on the want of any thing to create a liability on his part. In the present case, every thing is stated which is necessary to inform the party of the contract upon which he is sued; and is so stated as to shew a liability, whatever question may hereafter arise upon the want of mutuality in the contract. In *Eyre v. Hulton* (c), *Gibbs* C. J. said, that an affidavit of debt need not contain all matters required in special pleading; and that principle is not denied in *Balbi v. Batley.* (d)

Per Curiam. The principle to be collected from all the decisions on this point is, that the Court can take nothing by intendment in an affidavit of debt; and that a party cannot be arrested and deprived of his liberty, unless the affidavit discloses a cause of action against

(a) 11 *East*, 315.(b) 5 *M. & S.* 446.(c) 5 *Taunt.* 704. *S. C.* 1 *Marsh.* 315.(d) 6 *Taunt.* 25.

him.

1822.

MACPHERSON
against
LOVIE.

him. In the present case no cause of action is shewn, no consideration for the defendant's promise being stated. The rule prayed for must therefore be granted.

Rule absolute.

Wednesday,
November 27th.

HODGSON, Gentleman, *against* FORSTER, METCALF, FERGUSON, and DODGSON.

Where a plaintiff did not appear at the trial, the record having been taken down by proviso, and a verdict for the defendants was taken by mistake at *nisi prius*, instead of a nonsuit; the Court, though this was irregular, would not permit the plaintiff to set it aside, unless on the terms of consenting to a nonsuit being entered.

IN this case, the declaration was filed in *April*, 1818.

The defendants, *Forster* and *Metcalf*, pleaded to issue; and issue was joined in *Trinity* term, 1818. *Ferguson* suffered judgment by default, and *Dodgson* died after plea, and before issue joined. The plaintiff having made default, the cause was carried down by proviso to the last *Cumberland* assizes, when no person appeared for the plaintiff; and a verdict was taken for the defendants, *Forster* and *Metcalf*, instead of a nonsuit, the plaintiff not having appeared.

Littledale, in this term, applied for a rule *nisi* for setting aside this verdict, on the ground that this was irregular, and cited *Gardner v. Davis (a)*; and contended, on the authority of that case, that the Court had no power to enter a nonsuit now. But,

Per Curiam. In that case the Court set aside the verdict; and afterwards, on application to them by the defendant to enter a nonsuit, they found that they had

(a) 1 *Wilson*, 300.

no power to do justice between the parties. To prevent that, as this is an application to our discretion, we shall not grant it, unless on the terms that the plaintiff will consent to a nonsuit being entered.

1822.

HODGSON
against
FORSTER.

However, on the merits stated in the affidavits, and on payment of costs, they afterwards granted a rule nisi generally. The merits were distinctly negatived by the affidavits on the other side; and the Court ultimately made the rule absolute, on the payment of costs, the plaintiff consenting that a nonsuit should be entered, instead of a verdict for the defendants.

Scarlett, for the defendants.

Rule accordingly.

DURDEN and Another *against* HAMMOND.

Wednesday,
November 27th.

IN this case a latitat was issued in *Trinity* term last, tested on the 7th of *June*, and returnable on the 19th; on the 17th of that month the writ was altered, made returnable on the 25th of *June*, and resealed; the return-day was afterwards altered, in like manner, to the 6th of *November*, and again to the 28th, and on each occasion the writ was resealed. The defendant was arrested on the 13th of *November*. A rule nisi having been obtained to set aside the latitat, and to have the bail-bond delivered up to be cancelled, on filing common bail,

Before a writ is returnable, it may be altered as to the return-day without being re-stamped, provided the last-appointed return-day be not beyond the time at which the writ might at first have been made returnable.

Hutchinson

1822.

—
DURDEN
against
HAMMOND.

Hutchinson now shewed cause. In this there is no irregularity; for the writ, although several times altered, is still returnable in time, no term intervening between the teste and the last-appointed return-day; and each alteration was made before the writ was actually returnable.

Brodrick, contra. In order to make this proceeding regular, the writ should at all events have been restamped as well as resealed, for a duty of 5s. is imposed upon every writ issuing out of this court (a); and if the plaintiff may in this manner, without having his writ restamped, avoid the necessity of issuing an alias, the revenue will be defrauded.

Per Curiam. There has not been any irregularity in this case. This writ, which was issued in *Trinity* term, might at first have been made returnable at any time in the present term. Now the rule is, that before a writ is returnable, it may be altered and resealed in the manner here stated, without being stamped anew; provided no term intervene between the teste and the day on which it is ultimately made returnable.

Rule discharged.

(a) See 55 G. 3. c. 184.

1822.

FEATHERSTONE *against* **HUNT, STABB, and PRESTON**, (sued with **NOBLE**, outlawed in the suit.)

Wednesday,
November 27th.

ASSUMPSIT for goods sold and delivered, and the usual money counts. There was also a count against the defendants, as drawers of a bill of exchange, dated *February* 4th, 1819, for 331l. The defendant, *Hunt*, pleaded the general issue. The other defendants, *Stabb* and *Preston*, suffered judgment by default. At the trial before *Abbott C. J.*, at the *Guildhall* sittings in this term, it appeared, that all the defendants had carried on business in partnership at *Newfoundland*. The goods in question, to the amount of 331l., were furnished by the plaintiff to the firm, in payment for which they drew the bill stated in the declaration upon *Hunt*, who also carried on a separate trade in *London*, under the firm of *Hunt and Co.* This bill was presented by the plaintiff, but acceptance was refused. There was no doubt that the defendants were all originally liable: but the question was, whether, by the conduct of the plaintiff, the defendant, *Hunt*, had been discharged from his liability. As to that the facts were these: Subsequently to the bill being dishonoured, the partnership between the defendants was dissolved, and *Stabb* and *Preston* and others entered into a new firm at *Newfoundland*, and the new firm purchased from the old firm property there, to the amount of several thousand pounds. The plaintiff, in the meanwhile, indorsed over to the new firm the bill in question, and

Where the holder of a bill of exchange being a security for a debt due from *A. B. C. and D.*, indorsed over and put the bill into the hands of *B. C. and D.*, who settled their accounts with *A*, saying that the bill had been satisfied by them, *but the bill itself was not produced to, or seen by A. at the time of such settlement*: Held, that this was no defence to *A.* in an action by the holder against *A. B. C. and D.*, the bill not having been in fact satisfied by the persons to whom it had been indorsed and handed over.

1892:
 FEATHERSTONE
 against
 HUNT.

sent it to *Preston*, at *Newfoundland*, (a partner in both firms,) in order, if possible, to obtain payment for it. *Hunt* also sent out an agent of the name of *Rendall* to *Newfoundland*, to settle his accounts with the new firm. In those accounts the bill in question was set off, as paid by them, and it was allowed in account by *Rendall*, and the balance, after this allowance, due to *Hunt*, was paid over. *It did not appear, however, that the bill was produced to or seen by Hunt's agent at the time of this settlement.* The amount of the bill was never paid to the plaintiff by the new firm, and they having subsequently become bankrupts, the plaintiff commenced the present action. The Lord C. J. at the trial, was of opinion that this was not a discharge of *Hunt's* liability, being a mere arrangement between *Hunt* and the persons jointly liable with him; and the bill not being produced at the time of the settlement, the defendant's agent had no reason to believe that it was satisfied. The jury, under his direction, found a verdict for the plaintiff: and now

Wilde moved for a new trial, on the ground of misdirection. Here the plaintiff, by giving *Preston* possession of the bill, and indorsing it over to the new firm, enabled the latter to practise a fraud upon *Hunt*, who has settled the account between himself and them, on the faith of the bill having been satisfied. The bill was not sent to *Preston* merely as agent, for it was indorsed to the new firm, and of course, under such circumstances, it was reasonable to presume that the plaintiff had been satisfied. If it is urged that *Rendall* ought to have required possession of the bill before he allowed it in account, it may be answered that he had no right to

to require this bill, being the joint property of *Hunt* and his partners, of whom *Preston* was one. The case, therefore, falls within the general principle, that if a plaintiff enables a third person, by the possession of the security, to settle his accounts, and the third person does so, he cannot afterwards recover upon that security, although he has not been in fact paid by the individual to whom he entrusted the possession of it.

1822.

FRATERNITY
against
HUNT.

ABBOTT C. J. On the facts of the case it appeared that the plaintiff put the bill into *Preston's* hands, with a view to obtain payment, expressly reserving his rights on all the parties to it, in case the bill should not be paid by *Preston*. Subsequently to this, on the settlement of the account between *Preston* and *Rendall*, this bill was stated by the former, as having been satisfied, and was in consequence allowed in the account. But the bill itself was not produced at that time to *Rendall*, and it cannot, therefore, be contended, that the circumstance of the possession of the bill enabled the party to practise any deceit. If that fact had appeared, the case would have been very different. It seems to me, that the verdict is right, as the case now stands. This rule must, therefore, be refused.

BAYLEY J. If I, incautiously, by putting a security for a debt due to me into the hands of a third person, enable that person to deceive my debtor, in the settlement of an account between them, I must take the consequences, in case my debtor is thereby deluded. That fact, however, is wanting in this case. It is true, that *Preston* said that the bill was satisfied, but he did not prove it, by producing the bill to *Rendall*. If he had

1822. done so, the plaintiff would have been in a very different situation.

FRANKSTON
against
HUNT.

HOLROYD and BEST Js. concurred.

Rule refused.

Thursday,
November 28th.

PEERS against GADDERER.

A bankrupt, who has obtained his certificate, cannot be arrested upon a subsequent promise to pay a debt due before his bankruptcy.

CAMPBELL, on a former day in this term, obtained a rule to shew cause why the defendant should not be discharged out of custody on filing common bail. His affidavit stated, that on the 12th November, 1822, the defendant was arrested at the suit of the plaintiff for 16*l.* 19*s.*, and that after 9*l.* 4*s.* of that debt was contracted, the defendant became bankrupt, and obtained his certificate, which was duly allowed in 1820: and now

Platt shewed cause upon an affidavit which stated, that after the defendant had obtained his certificate, he promised to pay the debt. Although in *Wilson v. Kemp* (a), it was held that an insolvent debtor who had taken the benefit of the 54 G. 3. c. 28., was not liable to arrest upon a subsequent promise to pay a debt contracted prior to the day prescribed in the act; yet, in *Horton v. Moggridge* (b) the Court of C. P. were of a different opinion. The case of *Bailey v. Dillon* (c), relating to the arrest of bankrupts upon promises made,

(a) 5 M. & S. 595.

(b) 6 Taunt. 565.

(c) 2 Burr. 736.

after

after their bankruptcy, to pay debts due before, cannot be supported. That case was decided upon the ground, that the new promise being founded only upon a conscientious obligation, did not make the party liable to arrest; the same objection might be applied to promises made by persons when of age, to pay debts contracted during infancy. Unless, therefore, it be held that such persons are not liable to be arrested, this defendant cannot be entitled to his discharge.

1822.

 PEERS
 against
 GARDNER.

Campbell, contra. The words of the statute 5 G. 2. c. 30. s. 7. put this matter out of all doubt. "And in case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded, for any debt due before such time as he, she or they became bankrupt, such bankrupt shall be discharged upon common bail." He was then stopped by the Court.

ABBOTT C. J. I have no doubt that the case of *Wilson v. Kemp* was rightly decided, and the words of the statute which has been cited are extremely strong. It must be a question for the jury, whether or no the bankrupt has made himself liable by a new promise, and until they have decided that question against him, he is entitled to be discharged.

Rule absolute. (a)

(a) See *Blackburn v. Ogle*, 8 Price, 526. contra; but the statute 5 G. 2. c. 30. does not seem to have been referred to.

1832.

Thursday,
November 28th.

**DOE on the Demise of DAVIES and Wife, against
ROE.**

Where a plaintiff in ejectment has been nonsuited, the defendant not having appeared to confess lease, entry, and ouster, judgment may be regularly signed on the first day of the ensuing term, and a writ of possession issued on the same day, although the postea be not delivered over at the time by the associate to the attorney for the plaintiff.

TAUNTON had obtained a rule nisi for setting aside the writ of habere facias possessionem, issued in this case, with costs for irregularity and for restoring the possession. The affidavits in support of the rule stated, that at the last *Summer* assizes for the county of *Hertford*, the plaintiff in this case was nonsuited, the defendant not having appeared to confess lease, entry, and ouster. On the 6th *November* judgment against the casual ejector was signed, and on the same day a writ of possession issued, but the plaintiffs' agents did not obtain the postea from the associate until *November* 12th. The affidavit in answer stated, that the practice of the associates for the different circuits is not to deliver out any postea to the successful party till the 5th day of the term following the assizes, without any distinction; that the postea, when obtained, are not deposited in the treasury, or other office of K. B., except where it is necessary to enter up a final judgment on the roll under them, in which case they are left with the clerk of the treasury for that purpose, and are afterwards withdrawn and kept by the attorney of the successful party. The affidavits also stated, that the writ of possession had been received by the sheriff before the 12th of *November*; and that, on that day, by an arrangement agreed on between the attorneys

on

on both sides, possession had been actually delivered under it to the lessors of the plaintiff.

1822.

*Doe dem.
DAVIES
against
Roa.*

Campbell shewed cause, and contended that there was no irregularity in the case, and even if there were, it had been waived by the agreement between the parties. In support of the regularity of the proceeding, he cited *Doe dem. Lord Palmerston v. Copeland*. (a) Here, the 6th November, on which day the judgment was signed, was the day in bank, and it is not necessary to have the *postea* actually in court.

Taunton, contra. Here it appears that that could not have been done, for it is sworn, and not denied, that it was with the associate at the time. In *Doe v. Copeland*, the Court held that the writ of possession cannot be taken out till the *postea* comes in on the day in bank; and in *Lilly's Practical Reg. tit. Postea* (b), the same rule is laid down. For the Court and its officers are thereby informed what the result of the trial has been. It ought, therefore, to be produced, or to be capable of being produced at the time when the judgment is signed. In *Shanford v. Chamberlane* (c), which was a case of ejectment, the Court held the judgment irregular, being signed on the day of the return of the *postea*, although not executed till after the 6th day; which is a stronger case than this. And in *Sir Hugh Middleton's* case (d) it is decided, that judgment against the casual ejector cannot be entered up till the *postea* is returned and indorsed, that the nonsuit was for want of

(a) 3 T. R. 779.

(b) Vol. ii. p. 423.

(c) 5 Mod. 205.

(d) 1 Keble, 246.

1822.

DOE dem.
DAVIES
against
ROE.

confessing lease, entry, and ouster. The judgment is therefore irregular, and there is no waiver here, for the arrangement as to the giving possession, was only to prevent the writ of possession being executed in a hostile manner, and was not intended as a waiver of any irregularity. Besides, the attorney in the country on the 12th *November*, might well suppose that judgment had been regularly signed, as it might have been if the *postea* had been obtained sooner from the associate. As to the practice of the associates, if wrong, it ought to be corrected, and can have no weight on the determination of this court.

ABBOTT C. J. It is quite clear that we ought not to grant the present application. The writ of possession has been executed at all events, only a day earlier than according to the strictest rule it ought to have been; and in *Doe v. Copeland*, where the Court held the writ of possession irregular, they did not set it aside, but only referred it to the Master, to ascertain the damage sustained by the tenant from the too early execution of the writ. This is all, therefore, which we could do in this case; and to do this would be absurd, as no damage can have been sustained. Perhaps, in strictness of law, this may have been irregular; but even if it be so, this rule must be discharged.

BAYLEY J. In the case of *Shanford v. Chamberlane*, there was a verdict for the plaintiff at the trial, and then a rule for judgment is necessary. Here it is not so, and the judgment may be signed on the day in bank. It seems to me, therefore, that the proceedings are perfectly regular.

HOLROYD

HOLROYD J. I am of the same opinion. The distinction is, between the cases where there is a rule for judgment required, and where that is not so. Where a rule is requisite, judgment cannot be signed till it has expired. But here, no rule for judgment is necessary. It is said, that the *postea* should be actually in court. That is not according to our ordinary practice. Motions for new trials and in arrest of judgment are constantly made without the *postea* ever being produced to the court.

BEST J. concurred.

Rule discharged with costs.

BRADNEY and Another *against* HASSELDEN, on the Demise of HARPER and Others, (in Error.)

Thursday,
November 28th.

RYAN had obtained a rule nisi, calling upon the heirs of the plaintiffs in error, and upon the tenants in possession of the premises in this ejectment, to shew cause why, on payment of costs, the declaration should not be amended by enlarging the several terms of ten years and five years therein mentioned, to the term of seventy years. The application was made on the behalf of the son and heir of the defendant in error, who had died in 1777. It appeared, that in 1763, the defendant in error had in an ejectment tried at the *Stafford Summer* assizes, obtained a verdict against the plaintiffs in error for the recovery of the possession of certain messuages, &c. subject to the opinion of the Court of

A party having been prevented from suing out execution in an ejectment by an injunction in chancery, which continued in force for many years, during which the term in the declaration in ejectment expired, the Court would not permit it to be enlarged, unless it were quite clear that the amendment would work no injustice to the opposite party.

Common

1822.

DOE dem.
DAVIES
against
ROE.

1822.

————
 Error
 against
 Hammick.

Common Pleas on a case reserved. In *Trinity* term, 1764, that Court gave judgment for the defendant in error, which judgment was afterwards in *Easter* term, 1766, affirmed by this Court. Subsequently to that judgment, the plaintiffs in error obtained an injunction in Chancery for staying execution. The affidavits stated, that between that period and the death of the defendant in error, many attempts were made to obtain a hearing in Chancery without success; and that, for want of funds, the parties interested were unable to proceed, and the injunction continued in force. In the meantime the original parties died, and the whole fee became ultimately vested in the present applicant to the Court. The terms in the declaration had long since expired.

Tindal (*Alexander* and *Patteson* were with him,) shewed cause. This is an application to the discretion of the Court, and the rule laid down in *Doe v. Tuckett* (a) to guide that discretion is, that the Court must with certainty see that injustice will not be done by granting the rule. Here they cannot do so. Probably there had been some settlement between the parties before 1777. He was then stopped by the Court, who called on

Gaseles and *Ryan* to support their rule. In *Doe v. Tuckett*, the party applying had been guilty of laches. Here he has not, for during all the period he has been stopped by an injunction from Chancery. In *Vicars v. Haydon* (b), the party had been delayed in a similar way, and there the Court allowed the amendment.

(a) 2 B. & A. 773.

(b) Cowp. 841.

ABBOTT C. J. Here, for thirty or forty years the party has been inattentive to his own interests, and we cannot now relieve him. The rule we have already laid down, seems to me to be the right one. I cannot see distinctly what would be the consequences of granting this application. Perhaps we should thereby do great injustice; at any rate, it is incumbent on the party applying to shew us distinctly that we should not do injustice, and this he has failed to do. If he has any merits, the proper course would be to apply to the chancellor, who may, if the case requires it, order the parties to consent to a rule for this amendment. We cannot grant it on the present affidavits.

Rule discharged.

1822.

BRANFORD
against
HARRISON.

The KING against GEORGE WEBB HALL.

Thursday,
November 28th.

QUO warranto against the defendant for using and exercising the office of register and clerk of the Court of Request in the city of *Bristol*. Plea, that by statute 1 *W. & M.*, a court of request was erected in *Bristol*, and the mayor, aldermen, and common council of that city, or any three of them, whereof the mayor or one of the aldermen for the time being should be one, were appointed commissioners for hearing and determining all matters and causes in that court; and were directed to supply any vacancy occasioned by the death

Where *A.*, carrying on trade in partnership with others, had a dwelling-house, and counting-house attached to it in *B.*, the counting-house being used by the different partners, who daily resorted thither for the purposes of their trade, and the dwelling-house being occupied by a

clerk or servant of the firm, paid by them, as were also the rates, taxes, &c.: Held, that *A.* and each of his partners was a householder in *B.* within 26 *G. 3. c. 38. s. 8.*, although neither he nor they actually resided with their families in *B.*

So, also, where the dwelling-house was occupied by one of the partners rent-free, and the taxes, &c. were paid by the firm.

OR

1822.

The King
against
Hall.

or removal of a register or clerk by the appointment of a successor, which said commissioners, or any three or more of them, were thereby authorised and empowered to execute the powers and authorities of the said act. That on *April* 10th, 1818, the office of register and clerk became vacant; and that on *May* 2d, 1818, divers commissioners, duly qualified to act, viz. the mayor, four of the aldermen, and eight of the common council-men, did assemble in the council-house in the said city, in order to nominate some person to fill up the vacancy; and that the defendant was then and there duly appointed by a majority of such of the said persons so assembled as were duly qualified to vote, that is to say, by the votes of two of the aldermen and six of the common council-men assembled, *the said last-mentioned persons being respectively householders within the said city, and duly qualified to act as commissioners*, and was then and there, by all of them, the said mayor, aldermen, and common council-men so assembled, declared to be nominated and appointed by a majority of the persons qualified as aforesaid to the said office. The replication denied that the defendant was, by the votes of a majority of such of the said persons so assembled as were qualified to act as aforesaid, duly nominated and appointed; and also denied that the said persons, viz. two of the aldermen and six of the common council-men aforesaid, *were respectively householders in Bristol, or duly qualified to act as commissioners*. Issue thereupon. At the trial before *Graham B.*, at the *Bristol* assizes, 1819, it appeared that the office having become vacant, an election took place on the 2d of *May*, 1818, to supply that vacancy. Upon that occasion thirteen persons attended, and gave their votes;

eight

eight for the defendant, and five for Mr. *Palmer*. The eight persons who voted for the defendant were as follows: *Levi Ames*, *Michael Castle*, *George Hilhouse*, *William Fripp*, *William Fripp* the younger, *Levi Ames* the younger, *Edward Brice*, and *James George* the younger; and one of the persons who voted for Mr. *Palmer* was Mr. *John Haythorn*. It was contended on the part of the crown, that seven of the eight persons who had voted for the defendant, Mr. *Hall*, were not householders within 26 G. 3. c. 38. s. 8., and consequently that Mr. *Hall* was not duly elected.

Levi Ames, at the time of the election, carried on the business of a drysalter, on premises within the city of *Bristol*, in partnership with three other persons; and there was annexed to these premises a dwelling-house, the property of *Levi Ames* only. There was formerly an internal communication between the dwelling-house and the other premises, which had been closed up recently, but whether before or after the election in question did not appear. This house was occupied by one *S. Cuff*, his wife and maid servant. The furniture belonged to *S. C.*, who, however, did not hold the house under any lease, but merely occupied it as the clerk and servant of the firm, receiving wages from them, and liable to be dismissed from his situation as a servant, and from the dwelling-house at their pleasure. This house was assessed to the king's taxes, and rated to the poor-rates in the name of the firm; and the taxes and rates were paid by them. *Levi Ames* was in the habit of resorting daily to the premises and dwelling-house in the city for the purposes of his business; but he never slept in the dwelling-house, or upon any other part of the premises, nor was any bed ever reserved for him there, his dwelling-house

1822.

The King
against
Hall.

1822.

—
The King
against
Hall.

ing-house being in the parish of *Clifton*, in the county of *Gloucester*, where he constantly, and on the 2d of *May*, 1818, resided with his wife and family.

Michael Castle and his three partners carried on the business of rectifiers, &c. in premises in the city of *Bristol*. Attached to these premises was a dwelling-house, the property of his two nephews, one of whom only was a partner in the trade with him. The counting-house of the company formerly constituted part of the dwelling-house. There was a door between them. The dwelling-house was in the occupation of the partners, who frequently met in the same for the purposes of their business, as well as in the other parts of the premises. *Tovey*, a clerk to the firm, with his wife and servant, resided in the house, having been placed there as a clerk by the partners for the protection of the property, and being liable to be dismissed from his situation, and from the dwelling-house at their pleasure. This house was assessed in his name to the king's taxes, but was rated to the poor in the name of the firm, by whom the rent, taxes, and rates, were all paid. A servant boy, whose wages were paid by the partnership, also slept in the dwelling-house. *Castle*, with his wife and family, resided at *Stapleton*, in the county of *Gloucester*, previously to, and on the 2d of *May*, 1818.

The case of *George Hillhouse* was similar to that of *Levi Ames*.

William Fripp, with his partners, *William Fripp* the younger and two others, carried on the business of soap manufacturers on premises within the city of *Bristol*, to which a dwelling-house, communicating therewith, was attached; but the dwelling-house had been wholly unoccupied for some years, and was so on the
2d of

2d of *May*, 1818. There was a counting-house, in which the business of the firm was conducted, which communicated with the dwelling-house, and *Fripp* the elder was in the habit of going there almost daily, the business of the firm being conducted on the premises. The premises were not assessed to the assessed taxes, but were rated for the poor-rate, watch-tax, paving-tax, gaol-tax, and dock-tax, which rates were paid by the firm. There was a watchman set in the warehouses at night to guard the premises, but he had no command of the dwelling-house, and could not enter it, the door being locked. *Fripp* the elder, with his partners, *Edward Brice* and four others, also carried on the business of bankers, in a building within the city of *Bristol*, belonging to that banking firm. This building consisted of the banking and counting-house, and a dwelling-house behind them, in which, at the time of the election, and for two or three years before, one of the partners, named *New*, resided with his family, rent-free. This house was assessed to the king's taxes, and rated to the poor, in the name of the firm, who paid taxes and rates for the same. *Fripp* the elder was in the habit of resorting to the bank and counting-house frequently, but not to the dwelling-house, that being reserved for *New*. *Fripp* the elder had not served any parish office in respect of this property, but had served as a special juror for the city of *Bristol*. He did not sleep there, nor was any bed ever kept there for him, his actual residence at the time of the election being at *Kingsdown*, in the county of *Gloucester*.

William Fripp the younger, was one of the partners in the soap manufactory, and as such, was in the constant habit of resorting to and using the premises.

1822.

The King
against
HALL.

1822.

The KING
against
HALL.

premises. He had not any other house property in *Bristol*, and had not served any parish office in *Bristol*, nor on the grand jury. His residence, at the time of the election, was in the parish of *Henbury*, in the county of *Gloucester*.

Levi Ames, junior, at the time of the election, in partnership with *Robert Rankin*, carried on the business of a manufacturer of sweets, on premises belonging to himself in the city of *Bristol*. The premises consisted of a dwelling-house and warehouse, with a communication between them. In the dwelling-house there was a counting-house and committee-room, to which he was in the habit of resorting for the purposes of the business. The furniture in the dwelling-house belonged exclusively to *Rankin*, who paid no rent, and only occasionally slept there, but not with his family, or any part of it, his house being a mile off; at all times somebody slept there, for the security of the house, either *Rankin* or a clerk. The domestic servants of this house were paid by *Rankin*. *Levi Ames*, junior, never slept in this house, nor was any bed ever kept for him there, his actual residence with his wife and family being, at the time of the election, and long before, at *Clifton*, in the county of *Gloucester*. He had not served any parish office in respect of this property, but had served upon the grand and special juries for the city of *Bristol*. The dwelling-house was assessed to the king's taxes in the name of *Rankin*; but to the poor-rate in the name of the firm, by whom the rates and taxes were paid.

Edward Brice was one of the partners in the before-mentioned banking-house of *William Fripp* and Co., the circumstances of which have been already stated. He also, in partnership with others,
carried

carried on the trade of a sugar-refiner, on premises in the city of *Bristol*, attached to which was a dwelling-house, which had not been occupied by any one for many years, and which, at the time of the election, was rated as a warehouse. One room in it was used by him, almost daily, for a counting-house. The only furniture consisted of some chairs, in the counting-house; the rates and taxes were paid by the firm. His actual residence, at the time of the election, and long before, was at *Frenchay*, in the county of *Gloucester*. The above seven were the votes for the defendant, to which objection was made.

1822.

The King
against
HALL.

John Haythorne, (who had voted for *Mr. Palmer*,) at the time of the election, was mayor of *Bristol*, and as such, resided rent free, during his mayoralty only, in the mansion-house within the city which belonged to the corporation, who were assessed to and paid all rates and taxes for it. The furniture (except a few articles) belonged to the corporation. At the time of the election, and long before, *Mr. Haythorne's* own private residence was in the county of *Gloucester*.

The above persons had all uniformly acted as commissioners of the Court of Requests. The question was, which of the two candidates had the majority of legal votes. Four of the votes given for *Mr. Palmer*, and one of those given for the defendant, were admitted to be good. If five out of the first seven were good votes, or if four only of them were good, and *Haythorne's* vote bad, then the defendant had a majority. In any other case the verdict was to be entered for the crown. This case was argued on a former day in this term by

Selwyn, for the crown. The question is, whether these persons are householders within the meaning of

1822.

—
The KING
against
HALL.

the 26 G.3. c. 38. s. 8., which is a general act for regulating the time of the imprisonment of debtors, by process of courts for the recovery of small debts, and for ascertaining the qualification of commissioners, and it applies to all courts of requests. By s. 8. it is enacted, that no person shall be capable of acting as a commissioner, unless he be a householder within the county, district, city, liberty, or place for which he shall act, and shall be possessed of a real estate of the annual value of 20*l.*, or a personal estate of the value of 500*l.* According to the ordinary acceptance of the word "householder," it means "the master of a family living together." In *Johnson's Dictionary*, "householder" is interpreted "a master of a family," and "household," "a family living together." The act of parliament, therefore, requires, that a person, to come within it, should be the master of a family living together within the district for which he acts. Now that would exclude, from the right of voting, all the seven persons who voted for the defendant. These persons did not reside as masters of families in *Bristol*, for their families lived out of the city; and the mere carrying on their business within the limits is not enough. It may be said, that the servants and clerks were the families of the first three gentlemen living in *Bristol*; but they were not the servants of them alone, but of them and their respective partners in trade. [*Bayley J.* In case of an indictment for burglary, how would the premises be described?] They would be described, certainly, as the dwelling of the partners; but an indictment, describing them as the dwelling-house of one of the partners would be bad; the question therefore still remains open, whether one of several partners, the whole of whom together occupy a house,

house, is a householder within the meaning of this act, and whether the true construction is not, that they must be solely the masters of families within the district, and not what might be called fractional householders merely. It may be admitted, that, in *Rex v. Barwick* (a), the Court held, that a joint owner of land was liable to take an apprentice, and that it was not distinguishable from *Rex v. Clapp* (b) (which was the case of a sole owner.) But there, the word in the statute was "inhabitant," which has always had a more extensive construction than "householder." In the 43 *Elix. c. 2.*, where the overseers are required to be substantial householders, a more limited construction has been adopted; and in the case of *The Overseers of Weobley* (c), (a note of which, under the name of *Rex v. Sayers and Jones*, is to be found in Serjt. Hill's MSS., in Lincoln's-In library, copied from Mr. Ford's MSS. (d),) it was held, that an appointment stating the persons appointed overseers to be principal inhabitants was bad. Besides, the 26 G. 3. c. 38. s. 8. does not merely speak of householders, but annexes a qualification of property also. This shews that by householders were not meant owners of houses merely; for if so, the additional qualification would have been unnecessary. There are other acts in *pari materiâ* which throw light on this construction. By 22 G. 2. c. 47. s. 1. (the *Southwark Court of Requests'*

1822,

The King
against
Halt.

(a) 7 T. R. 33.

(b) 3 T. R. 107.

(c) 2 St. 1261.

(d) The following is the note referred to. The defendants were appointed overseers for the town of *Weobley*, and in the appointment were styled principal inhabitants. It was moved to quash this appointment, because they were not described to be substantial householders. *Et per Curiam*. The justices must certainly pursue the power given them, which is to appoint substantial householders, which is a much more limited description than inhabitants; for a man may be an inhabitant, and a principal inhabitant, and not be a householder; so this appointment is void.

1822.

—
The King
against
Hale.

Act) the commissioners are to be persons *residing within their districts*. The same qualification is required in the *Westminster Court of Requests' Act*, 23 G. 2. c. 27. s. 1., and in 23 G. 2. c. 30., for the tower hamlets; and the 25 G. 3. c. 45., from the seventh section of which the clause in question is nearly copied, was an act for consolidating these very local acts requiring residence. The word "householder" must, therefore, be taken as synonymous with "resident householder." In *Hargrave's Law Tracts*, p. 127., the case of the city of *London*, as to prisage of wines, is discussed. There the words of the charter are, *Quod nullus captor faciet aliquam prisam in civitate prædictâ vel extra de bonis civium, &c.* On this Lord *Hale* remarks, that "bona civium" must not be intended of every freeman of *London*. But "first, he must be a freeman of *London* : secondly, he must be a freeman and inhabitant of *London* ; for, though he be a freeman, yet if he inhabit out of *London*, he shall not be exempted from prisage, even for the wines imported into *London* ; and accordingly it is declared by that judgment of parliament, *Roll. Parl.* 11 H. 4 N. 73., *Est declare per le roy, per avise des seigniors in parlement, que nulle n'eit ne enjoy se tiel franchise en cest case que ne soit citizen resiant et demurrant deins mesme la citty ; et que tous autres demurrants en autres cittyes, burghes, ou villes, eint et enjoysent lour franchiseux graunt, savant tout dit a nostre seignior le roy son inheritance in cest case ; and accordingly it was agreed, in Hanger's case, 9 Jac. B. R., before cited : thirdly, he must not only be a freeman, and inhabitant," but he must also be a householder within the city ; and, therefore, P. 43 Eliz. in *Suede and Sacheverall*, a freeman of *London*, living in *London* as an inmate, shall not have his exemption ; for such*

a man

1822.

The King
against
HALL.

a man contributes not to scot and lot, nor is beneficial to the city; and this privilege was granted intuitu civitatis, not personæ." And in the report of the case of *Sacheverell v. Snede*, as found in *The Mayor of London v. The Mayor of Lynn (a)*, a question is stated to have arisen, whether a citizen of *London, who has not a family*, nor pays scot and lot, but sojourns in the house of another, shall have the benefit of the said charter. In the argument of which case *Coke*, Attorney-General, put this difference of citizens, viz. that there is a citizen nomine, a citizen re, and a citizen re et nomine; but it was resolved, that only the citizen re et nomine, viz. he who is a freeman, and also inhabits and pays scot and lot there, shall be free of prisage. The same doctrine is found in *Waller v. Hanger (b)* and in *Waller v. Travars (c)*. And all these shew, that the correct interpretation of "householder" is "pater familias." If this be so, these votes are all bad; for in none of these cases did the voters reside with their families within the city of *Bristol*. As to *Haythorne's* vote, it is clearly good, he being, as mayor at the time, actually resident in the mansion-house. (This was agreed to by *Adam*, for the defendant.) The crown, then, is entitled to the judgment of the Court.

Adam, contra. The word "householder" must not receive so strict a construction. The true meaning is, a person who keeps a house and frequents it for the purpose of his trade or business. It does not follow, because the word "household" means a family living together, that the word "householder" necessarily means

(a) 1 Bos. & Pull. 500. 7 Bro. Parl. Cases, 120. S. C.

(b) *Moore*, 252. (c) *Hardr.* 301. cited in 1 Bos. & Pul. 502.

1871.

THE KING
v. THE
BISHOP

the *pater familias*. The plain object of the 26 G. 3. c. 58. s. 8. was to provide, that the commissioners should be persons of character and station belonging to the district. And the present restriction sought to be imposed, viz. that a party must sleep in the house within the district, would be very injurious. The statute may be sufficiently complied with, if the party has a counting-house in the place. Lord *Coke*, in his reading on the statute of *Bridges* (a); says it down thus: "If a man dwelleth in a foreign shire, &c. and keepeth a house and servants in another shire; &c. he is an inhabitant in each." According to the argument on the other side, there is no distinction between householders *residents*, and householders. But if so, how is it to be accounted for, that the legislature continually distinguish between them? In 26 G. 3. c. 100., they speak of inhabitants householders, and inhabitant householders *residents*, which shews the distinction between them; and in the *Pontefract* (b) and *Ilchester* (c) election, cases in which *Noy*, *Selden*, and *Coke* took a part, it was held that the common law right was in inhabitants householders *residents* within the borough. The word "*resient*," therefore, is always added where an actual dwelling within the district is required. As to the objection, that "*householders*" cannot include "*joint-householders*," the case of *Rex v. Barwick* is material. For Lord *Kenyon* expressly says, that there the defendant occupying lands to the value of 23*l.*, that being his aliquot part of the whole, was an inhabitant. And although the 11 G. 1. c. 18. s. 7. confines the right of voting for aldermen and common councilmen of *London* to freemen being householders,

(a) 2 Inst. 702.

(b) *Glanville*, 18.(c) *Ibid.* 141.

yet the 10th section expressly provides, that partners in trade, and joint occupiers, may vote in respect of their joint houses, if of sufficient value. This shews the intention of the legislature in cases like the present. As to the cases of the prisage of wines, they are different. There the grant being in diminution of the revenue, was properly construed strictly, and so as to include as few as possible. Here the office being for the public good, the clause describing the qualification of the commissioners ought to be liberally construed, and so as to include as many as possible. Then if so, these votes are all good. The first three occupy the dwelling-houses by their servants, and in the strictest construction are householders. *Bertie v. Beaumont.* (a) In an indictment for burglary, the house would be described as their dwelling-house. *Res v. Stock.* (b) As to the others, *Ames junior* may be considered as occupying the premises by *Rankin*, who acted in this respect as his clerk, only sleeping there occasionally for the protection of the property; and the rest fall within the general principle contended for, that they are partners using the houses for the purposes of their respective trades. The defendant is therefore well elected, having a majority of legal votes.

1822.

The King
against
HALL.

Selwyn, in reply. The statute of *Bridges* and the 26 G. 3. c. 100. are not in *pari materia*, and cannot serve to explain the meaning of the word "householder" in 26 G. 3. c. 38.; and 11 G. 1. c. 18. is in favour of the crown, for it is expressly stated to be passed with a view to quiet disputes. It would follow, therefore, that but for that act, joint occupiers and partners are not

(a) 16 *East*, 35.(b) 2 *Taunt.* 359.

1822.

The King
against
HALL.

householders, and cannot vote. The case of burglary proves satisfactorily, that the house may be laid to be the dwelling-house of the firm. But it does not follow from that, that it is the dwelling house of each member. Yet it must be so, or the argument for the defendant in this case is not well founded.

Cur. adv. vult.

And now on this day, the judgment of the Court was delivered by

ABBOTT C. J. This case depends entirely upon the meaning of the word "householders," as used in the statute 26 G. 3. c. 38. By the statute 1 W. & M. the mayor, aldermen, and common council of *Bristol*, were appointed the commissioners of this Court of Requests. Under this statute, therefore, the official corporate character was the only qualification. Many acts for the establishment of similar courts had been passed before the 26 G. 3.; the statute of that year is a general law, and must be understood in reference to this court in *Bristol*, to have superadded the qualification of householder to the qualification before required. Now, the meaning of particular words in acts of parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion, on which they are used, and the object that is intended to be attained. The meaning of the word "inhabitants" in the statute of (22 Hen. 8. c. 5.) of bridges, which was referred to at the bar, affords an illustration of this proposition very applicable to the present case. The inhabitants of any county, city, or other place, taking that

that word either in its strict or in its popular sense, are those persons only who have their dwelling therein; and all persons who have their dwelling therein, are inhabitants thereof. But the object of the statute being to raise a fund for the repair of bridges, by the taxation of persons to a reasonable aid and sum of money for that purpose, and to enforce the payment of the tax in case of refusal, by distress on the lands, goods, and chattels of the persons taxed, the word "inhabitant" has been held on the one hand to include all the occupiers of lands in the county, &c. although actually living and dwelling, not in that county, but in some other; and on the other hand, not to include servants, lodgers, or inmates, although actually dwelling and abiding in the county.

The object of the stat. 26 G. 3. c. 38. appears to have been to unite respectability of character and circumstances in the place wherein the office of commissioner was to be exercised, with a habit of access and resort to that place. This object is attained by the exclusion of lodgers or inmates, having no permanent interest in the place, although a temporary residence, as well as persons having neither residence in the place, nor any such connection with it, as may induce a habit of access and resort to it. The word is "householders," not "housekeepers," and this word "householders," taken in any sense, will certainly exclude the classes that I have mentioned, and probably some others also, though it be not of so strict a sense as the word "housekeepers." It is sufficient for the purpose of this cause, if five of those who voted for the defendant, and whose right to vote is disputed, shall be found to be householders within the true meaning of this statute. And we think that five such
are

1822.

The KING
against
HALL.

1822.

The King
against
Hall.

are found, viz. *Levi Ames* the elder, *Michael Castle*, *George Hillhouse*, *William Fripp* the elder, and *Edward Brice*. Each of them, with his partners, is the tenant or holder of a dwelling-house; each, either by a servant or partner, sleeps in such house; and each is in the daily habit, for the purposes of business, of resorting to such dwelling-house, or to some of the buildings connected with it. In the first case, that of *Levi Ames*, the dwelling-house belongs to him; it is annexed to the premises where the partnership business is carried on, and it is occupied by a clerk of the partnership in the character of such clerk. In the next two cases, *Castle's* and *Hillhouse's*, one or more houses, attached to the premises where the partnership business was carried on, and rented by the partnership, were occupied by servants of the partnership, in their character of servants. In all these cases, the rent, rates, and taxes were paid by the partnership. In the two remaining cases, of *William Fripp* the elder, and *Edward Brice*, they both belonged to a banking-house, and a dwelling-house behind the bank was occupied by *Edward New*, one of their partners, in the character of partner. This dwelling-house belonged to the firm; they paid the rates and taxes, and *New* paid no rent. In each of these five cases, therefore, there was a dwelling-house belonging to or rented by the partnership; the charges upon it were paid by the partnership; it was attached to the premises on which the partnership business was carried on; and was inhabited as a dwelling-house, either by some of the servants of the partnership, or by a partner; and, under these circumstances, we are of opinion, that each partner before named, is, under the 26 G. 3., to be deemed a householder. It is, therefore,
unnecessary

unnecessary to say any thing, as to either of the other persons who voted for the defendant. It will be obvious to every one who has the slightest knowledge of the modern habits of persons engaged in the most respectable branches of trade and commerce in all the great towns in *England*, that an exclusion of persons in the situation of these gentlemen, would be an exclusion, in this and many other cases, of a very large portion of those who are best qualified for the discharge of the particular duty that may be the subject of enquiry. For these reasons we are of opinion, that the defendant is entitled to our judgment in his favour.

Judgment for the defendant.

SARD and Another *against* FORREST.

Thursday,
November 28th.

THE defendant was appointed one of the yeomen of the guard in 1816, and as such, was liable to be called upon at all times to attend the king's person, and had actually been in attendance several hundred times since his appointment. His warrant of appointment stated, that his person was not to be arrested or detained without leave from the lord chamberlain or the captain of the guard; and that he was not to bear any servile office, such as churchwarden, scavenger, or the like, or to watch or ward. The defendant was arrested without leave from the lord chamberlain, under a *capias* issuing

One of the king's yeomen of the guard had been arrested without leave from the Lord Chamberlain by process issuing out of the Palace Court; and that court had refused to discharge him out of custody on filing common bail. Bail above was put in, and perfected in that court, and after interlocutory judgment

signed, the defendant removed the cause into K. B. by *habeas corpus*, and put in and perfected bail. Under these circumstances the Court refused to order an *exoneretur* to be entered on the bail-piece.

out

1822.

SARD
against
FOREST.

out of the palace court at the suit of the plaintiff, and had applied to that court to be discharged out of custody on filing common bail on the ground of his privilege; but that application was refused, and special bail were put in and perfected in that court. A declaration was filed, and interlocutory judgment signed for want of a plea. The defendant then removed the cause into this court by habeas corpus, and put in and perfected bail on the first day of this term. A declaration was delivered, and interlocutory judgment signed for want of a plea, and a writ of enquiry was executed. A rule nisi having been obtained to enter an exoneretur on the bail-piece,

W. Erle now shewed cause. The privilege from arrest is given to the king's servants to prevent the inconvenience which would otherwise arise from the want of their personal attendance on the sovereign. No inconvenience can arise where the party is already, as in this case, out upon bail. There is not, therefore, any ground for entering an exoneretur on the bail-piece. But supposing that, in common cases, the Court would grant this application on behalf of bail, yet they will not do so where the bail is put in upon a habeas corpus sued out by the defendant. For where a defendant removes the cause by habeas corpus, he is bound to put in and perfect bail in the superior court, otherwise a procedendo issues of course. Here, the defendant has sued out the habeas corpus, and has used the bail for his own purpose in preventing the cause from being remanded, and therefore the bail ought not to be relieved.

Marryat,

Marryat, contra. The services required of the defendant were such as would clearly entitle him to the privilege of freedom from arrest ; and it is a general rule, that wherever the principal is entitled to his discharge, if rendered, the Court will relieve the bail without rendering. The fact of the bail having been put in on a habeas corpus cannot make any difference, for the defendant was unable without that writ to bring the case before this Court, the Court below having decided a similar motion against him.

1822.

SARD
against
FOREST.

ABBOTT C. J. Under the peculiar circumstances of this case, I am of opinion that an exoneretur ought not to be entered on the bail-piece. The defendant was arrested under process issuing out of an inferior court. He then made an ineffectual application to that court to be discharged out of custody upon filing common bail ; and it is to be presumed, that the Judge of that court acted properly upon that occasion. The defendant then, by his own act, removed the cause into this court, knowing that special bail must be put in and perfected in order to do so with effect. Having, therefore, treated the bail as valid in order to gain to himself a benefit, I think, that he ought not now to be permitted to treat them as null. The rule must therefore be discharged.

Rule discharged with costs.

.

1822.

**REX against The Inhabitants of PENNEGOES and
TOWN of MACKYNLLETH.**

The Court will not grant a certiorari to remove an indictment from the quarter sessions after judgment has been pronounced in that court.

IN this case, a bill of indictment for not repairing a bridge had been found against the defendants at the quarter sessions for the county of *Montgomery*. At the trial a verdict was found for the crown, and judgment pronounced accordingly, that a fine be imposed upon the defendants.

Sir William Owen now moved for a certiorari, to remove the indictment into this court for the purpose of taking objections to it, and after stating that it was doubtful whether a certiorari ought to issue in this stage of the proceedings, he referred the Court to the *Queen v. Dixon* (a), and *The King v. The Inhabitants of Oxfordshire* (b), and *Rex v. Nicholls* (c), where *Lee C. J.* recognizes the authority of the *Queen v. Dixon*; and he suggested that it would be hard upon the defendants to refuse this application, as the consequence would be, that they must have recourse to the more costly remedy of a writ of error.

Per Curiam. The defendants have thought proper to take the chance of succeeding at the sessions. They ought clearly to have applied for a certiorari before the

(a) 1 *Salk.* 150. 3 *Ibid.* 78. 2 *Ld. Raym.* 971. 6 *Mod.* 61.

(b) 13 *East*, 411.

(c) *Ibid.* 412. in notes.

trial,

trial, and it ought not to issue in this late stage of the proceedings. They can now avail themselves of objections to the indictment by writ of error only.

Rule refused.

1822.

**The King
against
The Inhabit-
ants of
PENNEGONS and
MACKYNLETH.**

*see The King v. Lefman 1 ad. alt. des
The King v. Wiggins 1 ad. alt. des*

JONES *against* DAVIES and Others.

THIS was an action of replevin. The cause was entered for trial at the court of great sessions for the county of *Cardigan*, and, on the very day before the trial would in due course have taken place, and after the defendants had incurred the expence of counsels' fees, and of procuring the attendance of witnesses, the certiorari was delivered to the Judges. It had issued without any notice having been given to the defendants' attorney, and without any special ground for its issuing having been laid before the Court. Sir *W. Owen* had, on a former day in this term, obtained a rule to quash or supersede the certiorari quia improvide emanavit; and that a procedendo should issue to the great sessions, and that the plaintiff should pay to the defendants, the costs incurred by them below, together with the costs of the application. In support of the rule, he cited *Zink v. Langton (a)*, and *Williams v. Thomas (b)*, in which it had been expressly held, that a certiorari could not, without special ground, be sued out to remove proceedings from the courts of the counties palatine, or of the great sessions of *Wales*; and he stated, that in *Morris v. Phillips, gent., Easter, 52 G. 3.*, and in several

A certiorari, issued to remove a cause from the court of great sessions in *Wales* without any special ground for so doing, and without any notice having been given to the opposite party, but was not delivered to the Judges of that court till the day before the trial would in course have taken place, and after great expences had been incurred: under these circumstances this court not only quashed the certiorari, and directed a procedendo to issue, but ordered that the party who caused it to issue should pay to the opposite party the costs incurred by the latter in the court below.

(a) 2 Dougl. 749.

(b) Ibid. 751. n.

other

1822.

JONES
against
DAVIES.

other bases the Court had, upon his motion, superseded writs of certiorari, which had issued to remove causes from the great sessions without any notice having been given to the other party.

W. E. Taunton shewed cause, and admitted that the certiorari must be set aside, and a procedendo issue; but he contended that this Court had no jurisdiction over the costs of the proceedings in the Court below.

Per Curiam. This Court has acquired a jurisdiction over those costs by the certiorari, and the Master may tax them as he does in other cases. Therefore, let the rule be made absolute in the terms in which it is prayed.

Rule absolute accordingly. (a)

(a) There were four other cases under the same circumstances, in which similar rules were made absolute.

END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

1823.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Third and Fourth Years of the Reign of
GEORGE IV.

*See Smith v. Goodwin & B. 1821 413
Hobbs v. Bond 10 B. 15
Dean v. Caldwell & 2d 123*

BRANSCOMB *against* BRIDGES and Another.

Thursday,
January 25d.

CASE for an excessive distress for rent-arrear. Plea, not guilty. At the trial, before *Abbott C. J.*, at the *Middlesex* sittings after last term, the plaintiff proved, that the rent in arrear had been tendered before the distress was made. It was objected, for the defendants, that the action should have been in trespass and not in case. The Lord Chief Justice overruled the objection, but reserved liberty to the defendants to move to enter a nonsuit, and the plaintiff had a verdict; and now,

Where the goods of *A.* were distrained for rent arrear after the amount had been tendered: Held, that *A.* might bring an action on the case for an excessive distress.

The *Solicitor-General* moved accordingly, and contended, that, as the rent due had been tendered before

L

the

1823.

BRANSCOME
against
BAIDGES.

the distress was made, and no subsequent demand and refusal of it was proved, the taking of the plaintiff's goods was without any colour of right, and was, therefore, properly the subject of an action of trespass.

Per Curiam. If the defendants had proved the tender, that would not have been a good defence, and they cannot be in a better situation, because the proof came from the plaintiff. Supposing that trespass would lie, still the plaintiff was at liberty to waive the trespass, and bring an action on the case. It has frequently been decided, that trover will lie after a wrongful taking, and that is a stronger case; for there the goods are, by the pleadings, stated to have come lawfully into the defendant's possession.

Rule refused. (a)

(a) See *Bishop v. Viscountess Montague*, Cro. Eliz. 824.

Smith v. Richmond 11 Ad 539

Friday,
January 24th.

WILLIAMSON against JOHNSON.

Where the declaration stated that a bill of exchange was indorsed by certain persons, trading under the firm of H. and F. by procuration of J. D.: Held, that this allegation was sup-

ported by evidence of J. D.'s hand-writing, and that he, being the managing partner in a firm which carried on all business of buying and selling under the designation of H. and Co., was in the habit of indorsing bills in the manner above stated; although there was no such person as F. in the firm of H. and Co., and no direct proof that J. D.'s partners were privy to those transactions. One partner may act for the whole firm by procuration.

C. J.,

C. J., at the *Guildhall* sittings after last term, it appeared in evidence, that several years ago *Habgood* and *Fowler* carried on business together, but about eight years since that firm was changed to *Habgood* and Co., in which house *Dison* was a partner, but in which there was no person of the name of *Fowler*. From the time of that change, all business of buying and selling was carried on by the partners, in the name of the new firm, but bills were sometimes indorsed by *Dison*, in the manner above stated, for the purpose of getting them discounted: no direct evidence was given to shew that *Dison*'s partners knew of these transactions, but it was proved that he conducted the whole of the business. It was contended for the defendant, that there was no evidence of an indorsement by any persons trading under the firm of *Habgood* and *Fowler*, and that without giving such evidence, the plaintiff could not make out his title to the bill. The Lord Chief Justice overruled the objection, but gave leave to the defendant to move to enter a nonsuit, and the plaintiff had a verdict; and now,

1826,

WILLIAMS
against
JENNINGS.

Marryat moved accordingly, and contended, that as there was no evidence that *Dison*'s partners were privy to the indorsement of the bill in the manner stated, there was no proof that they ever adopted the style and firm of *Habgood* and *Fowler*. Now, although the plaintiff was not bound to set out that indorsement, yet, as he has thought fit to do so, he is bound to prove it as stated. And even if it be held that *H. and Co.* did adopt the style of *H. and F.* for this purpose, still *Dison*, being a partner in the firm of *H. and Co.*, cannot properly be said to have indorsed the bill by *procuration* of that firm.

1823.

WILLIAMSON
against
JOHNSON.

ABBOTT C. J. It appears by the evidence, that *Habgood*, *Dixon*, and a person named *Lye*, carrying on business in partnership together, were known by the description of *Habgood* and Co. All their transactions of buying and selling were carried on in that name, but *Dixon*, who was proved to be the manager of the whole business, was also in the habit of indorsing bills in the names of *Habgood* and *Fowler*, by procuration, for the purpose of getting them discounted. The question then is, whether that sufficiently proves the existence of persons using, for the purposes of business, the style and firm of *Habgood* and *Fowler*. At the trial I was at first inclined to yield to the objection, but afterwards altered my opinion. I still think, that, as between third persons, there was sufficient evidence of an indorsement, by persons using the style and firm of *Habgood* and *Fowler*, inasmuch as *Dixon*, the managing partner in the firm of *Habgood* and Co. was in the habit of issuing bills into the world, indorsed under the former designation. The verdict was therefore right, and this rule must be refused.

BAYLEY J. I am of opinion that there was evidence to shew that the new firm, *Habgood* and Co., for certain purposes of trade, used the designation of the old firm, *Habgood* and *Fowler*; for *Dixon*, who was entrusted with the management of the business, was in the habit of indorsing bills by the designation of that firm, probably because they had credit at the *Bank*. If the style of *Habgood* and *Fowler* were not adopted by the new firm, this indorsement by *Dixon* would be a forgery, as being an indorsement in the names of fictitious persons, for the purpose of fraudulently gaining credit for the bill.

But,

But, under the circumstances of this case, there is no pretence for saying that any such crime has been committed. I think, therefore, that there was evidence of the existence of persons using the style and firm of *Habgood* and *Fowler*, for certain purposes of business; and there is no doubt, that one partner may, by procuration, indorse bills for the firm. There is not, therefore, any ground for this motion.

1823.

WILLIAMSON
against
JOHNSON.

HOLROYD J. I am of opinion that the verdict was rightly found for the plaintiff. This was an action by a third person, to whom the bill had been indorsed, in the form set out in the declaration; and it seems to me that evidence of *Dixon's* hand-writing would, as between third persons, have been sufficient, without proof of any usage on his part to indorse bills in this manner; but here there was evidence to shew, that certain persons, for particular purposes of business, used the style of the old firm, *Habgood* and *Fowler*. It has been urged, that one partner cannot act by procuration for the others: even if that were so, it would not, in my opinion, be a sufficient defence to this action. There was proof, however, of an acting by procuration, and I am of opinion that one partner may so act for the whole firm.

BEST J. concurred.

Rule refused.

1825.

*Sunderhof. a Day Dec 11 1824,*Saturday,
January 25th.

CATHERWOOD and Another, Administrators de bonis non of J. CATHERWOOD, deceased, against CHABAUD.

Where a bill of exchange was indorsed generally, but delivered to S. C. as administratrix of J. C., for a debt due to the intestate, and S. C. died intestate after the bill became due, and before it was paid: Held, that the administrators de bonis non of J. C. might sue upon the bill; and that their title was sufficiently proved by the letters of administration de bonis non, without producing those granted to S. C., the administratrix.

Defendant having pleaded an agreement made between the plaintiffs and other creditors of the defendant, of the one part, and defendants of the other part; that the

defendant should assign certain credits and effects to two persons upon certain trusts, and that plaintiffs agreed to accept those conditions in discharge of their demand, provided all the creditors assented; that defendant did assign, and that all the creditors assented. The replication denied that all the creditors assented: Held, that the affirmative of the issue being on the defendant, he was bound to prove the assent of all his creditors.

Semble. That he was bound to prove the assent of the plaintiffs as well as that of his other creditors.

ASSUMPSIT by administrators de bonis non of J. C. the elder, on a bill of exchange indorsed to S. C., in her lifetime, as administratrix of the said J. C. purport of the letters of administration de bonis non granted to the plaintiffs. Pleas, first, general issue. Secondly, that after making the promises set out in the declaration, and after the death of S. C. the administratrix, it was agreed between the plaintiffs, as such administrators as aforesaid, and certain other creditors of the defendant on the one part, and defendant on the other part, that defendant should assign certain credits and effects to two of his creditors upon certain trusts; and that plaintiffs and the other creditors would accept those conditions in discharge of their demands, provided that the whole of the creditors of the said defendant should join; that all the creditors did join, and defendant assigned his said credits and effects. Replication, that all the creditors did not join. At the trial before Abbott C. J., at the Guildhall sittings after last term, it was proved for the plaintiffs, that the bill in question was accepted by the defendant, and was afterwards indorsed generally, but delivered to S. C. as the administratrix of J. C., the elder,

for

1823.

CATHENWOOD
against
GUANAUD.

for money due to him in his lifetime; and that after the bill became due, S. C. died without having commenced any proceedings upon it. The defendant produced the agreement mentioned in the second plea, which was signed by several persons, but he offered no evidence to shew that those were the whole of the creditors, and it did not appear that the plaintiffs had assented. It was then objected for the defendant, first, that the bill was held by S. C. in her own right, and not in her representative capacity; and that, therefore, the right of action was in her personal representative, and not in the administrators de bonis non of J. C.; and that there was no privity between the plaintiffs and the administratrix of J. C. Secondly, that upon this record it was incumbent on the plaintiffs to prove the grant of letters of administration to S. C.; and, thirdly, that they were bound to shew that some of the creditors had not joined. The objections were overruled by the Lord Chief Justice, and the plaintiffs had a verdict with leave to the defendant, to move to enter a nonsuit. And now

The *Solicitor-General* moved accordingly. If a person to whom a debt is due die intestate, and the debtor give a bill for the amount to his administrator, and the administrator also dies intestate before the bill is paid; the bill goes to the administrator of the latter, and not to the administrator de bonis non of the original creditor, *Barker v. Talbot*. (a) There the debtor gave a bill to the administrator of his creditor, and afterwards paid the amount of it to the personal representative of the administrator, and not to the administrator de bonis

(a) 1 Vern. 473.

1823.

CATHERWOOD
against
CHABAUD.

non of the first creditor, and the Lord Chancellor decided the payment to be a good discharge of the debt. And in *Yates v. Gough* (a), it appeared that *Gough* being indebted to *Cowper* who died intestate, *Cowper's* widow, as administratrix, sued and recovered judgment against *Gough*, but also died intestate before execution: and it was held, that *Yates*, who took out administration de bonis non of *Cowper*, could not bring a scire facias upon the judgment, because there was no privity between him and the first administratrix. There are also cases which decide, that when the property remains in specie, it goes to the administrator de bonis non, but a distinction is taken where the cause of action arises out of a new promise made to the first administrator, *Betts, executor, v. Mitchell*. (b) Then, secondly, the plaintiffs were bound to shew their title, as they declared upon a cause of action arising after the death of the intestate whom they represented, *Hunt v. Stevens* (c); and they could not do that without producing the letters of administration granted to S. C. the administratrix, which was not done. The plaintiffs were also, upon the issue on the second plea, bound to shew the dissent of some creditors besides themselves; for their own assent was admitted by the form of the issue, and it would have been calling upon the defendant to prove a negative, if he were required to shew that no creditors existed besides those who signed the agreement.

ABBOTT C. J. It struck me at the trial that the defendant was bound to prove that all his creditors had

(a) 1 Feb. 33. Cro. Jac. 4. Mo. 680. S. C.

(b) 10 Mod. 316.

(c) 3 Term. 113.

assented

assented to the arrangement proposed; and a witness was called by him for the purpose of shewing the assent of the plaintiffs. In this, however, he failed; nor did he in fact prove the signature of any one creditor. The affirmative of the issue was certainly upon the defendant; and there is nothing in this case to prevent the application of the ordinary rule as to the burthen of proving such an issue, for the plaintiffs were strangers to the defendant's concerns, and cannot be supposed to know who were his creditors. The first point which has been taken, is of more importance. It was clearly established by the evidence that the bill in question was given to S. C., as the administratrix of J. C., for money due to her intestate; she took it as assets, and if she had received the money, that must undoubtedly have been accounted for to his estate. The money not having been received in her lifetime, the bill remained as a part of J. C.'s estate, and the right to it devolved upon the persons who afterwards became his representatives. This case differs widely from *Barker v. Talbot*; for there the debtor had actually paid the executor of the administrator: now, such a payment would, in equity, and might, perhaps, in law also, be a sufficient answer to any action afterwards brought to enforce payment of the same debt over again. Here no payment has been made by the debtor, who, therefore, cannot be damaged by this action. It has been decided in a variety of modern cases, that an administrator may sue *as such* upon a promise made to him in his representative character; and that principle governs my opinion upon the present case; for where the cause of action is such that the first administrator may sue in his representative character, the right of action devolves upon the administrator

1823.

 CATHERWOOD
 against
 CHABAUD.

1828.

CATHENWOOD
v.
CATHEN.

nistrator de bonis non of the intestate. With respect to the other point, I think that the form of the letters granting administration de bonis non, as set out in the report, was sufficient proof of the title of the plaintiffs; but, at all events, the neglect to produce the letters of administration granted to S. C. would not be a sufficient ground for sending the case to a new trial, when the objection could be obviated by the production of that instrument, it not being disputed that administration was duly granted to her.

BAXLEY J. It was decided in the case of *King v. Thom (a)*, that if a bill be indorsed to A. and B. as executors, they may declare as such in an action against the acceptor. In *Coxell v. Watts (b)* it was held that an administrator may sue in his representative character upon promises made to himself, where the money will be assets when recovered. Now, if the administrator dies intestate, without having sued upon such a promise, the administrator de bonis non may sustain an action upon it; for he succeeds to all the legal rights which belonged to the administrator in his representative capacity. Here S. C., the administratrix of J. C., might have sued as such upon the bill in question. This action was therefore properly brought by the administrators de bonis non. By this mode of proceeding, the money recovered is immediately applicable to the right fund, as assets of the first intestate; whereas, if the action had been brought by the personal representative of the administratrix of J. C., it would, in the first instance, have become a part of her estate, and must

(a) 1 T. R. 487.

(b) 6 East, 405.

afterwards

afterwards have been transferred from that to the estate of *J. C.*, the first intestate. With respect to the onus of proving the issue on the second plan, I think that, as the affirmative was upon the defendant, it was for him to adduce the proof; and it seems to me that the issue involves the necessity of shewing a consent by the plaintiffs as well as the other creditors.

1822.
 ———
 CAMBRIDGE
 GEORGE
 GUARDIAN

HOLMES J. I am of the same opinion. The decisions in the old cases proceeded upon the principle that contracts made with an administrator were personal to him, and that he must sue upon them in his own right, and not in his representative capacity. That principle has since been altered, and it has been ruled in several modern cases, that upon such contracts, an administrator may sue in his representative character. The older cases have, therefore, received a qualification, and are not now to be considered as law to their full extent. As to the objection that the letters of administration granted to *S. C.* were not produced, I think that the letters granted to the plaintiff, of which proof was made, sufficiently proved both the administrations. The affirmative of the issue was upon the defendant; he therefore was bound to prove it.

BEST J. In refusing this rule it is not necessary to decide that the administrator of the administratrix, *S. C.*, could not have sued; it is sufficient to say, that the administrator *de bonis non* might sue; and this observation may serve to reconcile the various cases which have been referred to. An action by the administrator *de bonis non* was certainly the most proper, that being the shortest and most convenient mode of bringing the money

1829. money recovered into the funds of the original intestate.

CATHERWOOD
against
CHABAUD.

There is not, therefore, any foundation for the first objection; and I agree with the rest of the Court in thinking the others equally invalid.

ABBOTT C. J. There is much weight in the distinction which has been taken by my Brother *Best*. There may be cases where the administrator of an administrator might and ought to sue, viz. if the first administrator had made himself debtor to the intestate's estate for the amount of a bill received in payment of a debt due to that estate.

Rule refused. (a)

(a) See *Partridge v. Court*, 5 Price, 412.

Monday,
January 27th.

PRICE and Others *against* LEA.

The traveller of *A. and Co.* in *London*, having called upon *B.* in the country for orders, *B.* gave an absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye at a certain price; the traveller said the price was too low, but that he would write to his principals, and if *B.* did not hear from them in one or two days, he might consider that his offer was accepted. *A. and Co.* never wrote to *B.*, but sent all the goods: Held, that this was not a joint order for them all so as to make the acceptance of the cream of tartar the acceptance of the lac dye also, within 29 *Car. 2. c. 3. s. 17.*

ASSUMPSIT for goods sold and delivered by the plaintiffs to the defendant. Plea, non-assumpsit, as to part, and a tender as to the residue. The replication took issue on the non-assumpsit, and admitted the tender. On the trial, before *Abbott C. J.*, at the *Guildhall* sittings after last term, it was proved, that on the 21st *March*, 1821, the traveller of the plaintiffs, who are drysalers in *London*, called upon the defendant, a carpet manufacturer at *Kidderminster*, for orders. The defendant ordered a cask of cream of tartar, and offered

to

to purchase two chests of lac dye, at a certain price; the traveller said the price proposed was below his limits, but he would write to his principals, and if the defendant did not receive a letter in one or two days, refusing to execute the order, he might conclude that his offer was accepted. The plaintiffs did not write to the defendant, but on the 29th of *March* sent both the cream of tartar and the lac dye, directed to him at *Kidderminster*. The defendant accepted the cream of tartar, and tendered the price for it (which was the tender pleaded) but refused the lac dye. Upon this evidence it was contended for the defendant, that the orders were distinct, and, consequently, the acceptance of the cream of tartar did not take the case out of the operation of the 17th section of the statute of frauds. (a) The Lord Chief Justice thought the objection fatal, and nonsuited the plaintiffs. And now,

1823.

 PRICE
against
L.R.A.

The *Solicitor-General* moved to set aside the nonsuit, and contended, that the order given by the defendant was a joint order for the cream of tartar and lac dye; for although the plaintiffs' traveller reserved for them an option, either to accept or refuse the offer made by the defendant, still the latter was at all events bound, if that offer was accepted; the order then being joint, the acceptance of the cream of tartar took the case out of the 17th section of the statute of frauds, and rendered the defendant liable to be sued for the price of the lac dye, which he refused to accept.

(a) 29 Car. 2. c. 3.

1863.

PRICE
against
L.A.

ABBOTT C. J. It must be taken as established, by the evidence, that an order was given for the cream of tartar; then a conversation followed between the defendant and the traveller respecting the lac dye, and it was agreed that a letter should be written to the plaintiffs upon the subject; what then passed cannot be considered as an entire contract for both the articles, and, therefore, the acceptance of one did not ratify the bargain for the other.

HOLROYD J. (a) A contract for the cream of tartar was made between the defendant and the traveller, but the agreement for the residue cannot be considered as complete, until the time allowed to the plaintiffs for deliberation had expired; there was not then one entire contract for both the articles, so as to make the acceptance of one the acceptance of the whole.

BEST J. concurred.

Rule refused.

(a) Bayley J. had left the court.

Monday,
January 27th.

WILKINSON, Gent. one, &c. against DICEYLL.

An attorney of the court of K. B. may sue out a commission of bankruptcy, and maintain an action for the fees due upon that business, without being admitted a solicitor in Chancery.

ASSUMPSIT for fees due to the plaintiff, for soliciting and obtaining a commission of bankruptcy, on the petition of the defendant, and upon his retainer. Plea, general issue. Upon the trial, before Abbott C. J.,

at

at the *Middlesex* sittings after last term, it was proved, that from the year 1803 to 1814, the plaintiff had been a solicitor, duly admitted in the Courts of King's Bench, Common Pleas, and Chancery, and had regularly taken out his certificate, but he had neglected to do so from 1814 to 1820. In 1820 he again took out a certificate, and was re-admitted in the Court of King's Bench, but not in the other courts. In 1821 the plaintiff sued out a commission of bankruptcy against one *Musson*, upon the retainer of the defendant. For the defendant it was urged, that the plaintiff could not sustain this action, inasmuch as he had not been re-admitted a solicitor in the Court of Chancery, and, therefore, had no right to practise in that court. The Lord Chief Justice over-ruled the objection, but gave the defendant leave to move to enter a nonsuit; and the plaintiff having obtained a verdict,

1823.

—
WILKINSON
against
DICKIN.

C. F. Williams moved according to the leave reserved, and contended, that by neglecting to take out a certificate after the year 1814, the plaintiff's admission in each of the courts became altogether null and void according to the 37 G. 3. c. 90. s. 31. Now, he was never readmitted in the Court of Chancery, and therefore had no right to act as a solicitor there. In the case of *Collins v. Nicholson (a)*, *Mansfield* C. J. said, that all proceedings by petition to the Chancellor are proceedings in Chancery; and, therefore, the obtaining a commission of bankruptcy, which is done by petition to the Chancellor, must be considered as business transacted in that Court.

(a) 2 TEMPL. 321.

Per

1823.

WILKINSON
against
DIGGELL.

Per Curiam. The case of *Collins v. Nicholson* only decided that a bill for business done under a commission of bankruptcy is taxable in Chancery, and not that the attorney must be admitted a solicitor of that Court in order to transact such business. The commission issues on the common law side of the Court of Chancery, and it has always been the practice for attorneys to sue out commissions of bankruptcy without being admitted solicitors of that Court, which they may properly be allowed to do, as it is not necessary that the name of any attorney should appear on the issuing of such commissions. The plaintiff, therefore, having been re-admitted in this Court, might lawfully transact the business in question, and was entitled to recover his fees in this action.

Rule refused.

Tuesday,
January 28th.

IVESON, Gent. one, &c. against CONINGTON,
Gent. one, &c.

Where the attorneys for the plaintiff and defendant, in a cause which was ready for trial, entered into an agreement whereby they personally undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a certain manner: Held, that the attorney for the plaintiff was personally bound to pay the costs when taxed in the mode specified.

ASSUMPSIT. The declaration stated that, by a certain agreement made between them, they, the plaintiff and defendant, did personally consent, undertake, and agree, that the record in a certain cause wherein one *W. L.* was plaintiff, and one *J. S.* was defendant, and in which cause the now defendant was attorney for *W. L.*, and the now plaintiff was attorney for *J. S.*, should be withdrawn; that the said *J. S.*

should

should take back again the horse in the pleadings in that cause named, and should pay a certain sum of money then agreed upon in that behalf to the said *W. L.*; that the costs of the said suit on the part of *J. S.*, should be taxed between the parties on the principle between plaintiff and defendant; and that such taxation should be made and perfected by certain persons therein mentioned. The declaration then averred mutual promises, performance by *J. S.* and the now plaintiff; and that the costs of the suit on the part of *J. S.*, were taxed in the manner appointed, and amounted to 89*l.* 2*s.* 11*d.*, which then became due to the now plaintiff under the said agreement and taxation, whereof defendant had notice, yet defendant would not abide by the taxation, nor would he pay the costs to the said plaintiff. Plea, general issue. At the trial before *Abbott C. J.*, at the *London* sittings after last term, the plaintiff gave in evidence an agreement signed by the defendant, corresponding with that set out in the declaration, and proved the taxation of the bill in the manner appointed by the agreement; no demand of costs had been made upon *W. L.*, the plaintiff, in the former suit. For the defendant, it was objected, that the agreement contained no promise by him to pay the costs awarded. The Lord Chief Justice overruled the objection; and the plaintiff having obtained a verdict, the defendant had leave to move to enter a nonsuit. And now

1823.

 IVESON
 against
 CORNINGTON.

Denman moved accordingly, and contended, that although the present defendant, as attorney for the plaintiff in the former suit, personally undertook that certain things should be done, yet that did not bind him to do

M

them.

1823.

IVESON
against
CONINGTON.

them. At all events, the defendant can only be considered as a surety, and cannot be called upon to pay this money until default has been made by his principal. Now it appears that no demand has been made upon Mr. L., and therefore, admitting that under some circumstances the defendant may be compelled to pay the sum awarded for costs, still the action was premature.

Per Curiam. The case of *Burrell v. Jones* (a) is not distinguishable from the present, for this agreement contains by implication, a promise to pay the costs when taxed; and the defendant having personally undertaken that the stipulation contained in that agreement shall be performed, is liable to an action for the non-performance of them. He cannot be considered a surety, for his client was not bound by that arrangement.

Rule refused.

(a) 3 B. & A. 47.

*Ex pte Harrison. 1 B. & A. 1. 410.
Ex pte Hardwell v. Mont. 1 B. & A. 195.
Ex pte Dunning. 12 M. & A. 271.*

1822.

DOSWELL against IMPEY and Two Others.

TRESPASS for false imprisonment. Pleas, first, Commissioners of bankrupts are not liable to an action of trespass for committing a person who does not answer to their satisfaction when examined before them touching the estate and effects of a bankrupt. not guilty; secondly, a justification, under 5 G. 2. c. 30. s. 16., which it is unnecessary to set out, as nothing turned upon the form of the plea, and an abstract of it is given in the judgment delivered by the Court; thirdly, a justification similar in substance to the second; fourthly, a general justification, under 13 *Eliz.* c. 7.; fifthly, a similar justification, under 1 *Jac.* 1. c. 15. Issue on the first plea; demurrer to the second and third, and joinder; and replication de injuria to the fourth and fifth pleas. The demurrer was argued in *Easter* term last, by

E. Lawes, for the plaintiff. The question for the Court is, whether commissioners of bankrupts are liable to an action of trespass under the circumstances stated upon this record. The case of *Morgan v. Hughes* (a) is decisive that an action on the case does not lie; if, therefore, any action be maintainable, it must be trespass. Now admitting, that, according to the case of *Dr. Groenvelt v. Burwell* (b), no action lies against a judge for any thing done by him in his judicial capacity; still the question to be decided here, is, what makes a judge? Lord *Holt's* definition of a judge is, that he has power to commit for punishment; and he adds,

(a) 3 T. R. 225.

(b) 1 Ld. Raym. 454.

1823.

—
DOWELL
against
IMPEY.

"commissioners of bankrupts may commit a man for refusing to be examined concerning the estate of the bankrupt; but they are not judges (a) :” and in the late case of *Brittain v. Kinnaird* (b), this dictum of Lord Holt was cited with approbation by Park J., who had once been a commissioner of bankrupt. In *Ex parte Scarth* (c) the Lord Chancellor held, that commissioners of bankrupts may, under certain circumstances, be compelled to pay costs occasioned by their misconduct, which would be a singular decision if they are judges. Again, the proceedings of commissioners of bankrupts are traversable. In *Dr. Bonham’s* case (d) it is said, that “the warrant of commissioners of bankrupts is under the great seal, and by act of parliament; yet, because the party grieved has no other remedy, if the commissioners do not pursue the act and their commission, he shall traverse that he was not a bankrupt, although the commissioners affirm him to be one.” And in *Bambridge v. Bates* (e) it was held, that, “although the commissioners have sole authority to adjudge a man bankrupt, yet in an action, the jury must find whether he was a bankrupt or no, and not barely by the adjudication of the commissioners.” Hence it follows, that if they exceed their jurisdiction, their proceedings are coram non iudici, they cease in the particular instance to be protected as commissioners, and are liable to an action of trespass. *Terry v. Huntington* (f), *Gregory’s* case. (g) In *Farr’s*

(a) 1 *Ld. Raym.* 467.(b) 1 *B. & B.* 439.(c) 15 *Ves.* 293.(d) 8 *Rep.* 240.(e) *Sir T. Raym.* 337., and *Vin. Abr. tit. Creditor and Bankrupt*, (C) pl. 2. *S. C.*(f) *Hardr.* 480.(g) 5 *Mod.* 368.

case (a) the Lord Chancellor would not interfere to control the discretion of the commissioners, as to the questions which should be put to a bankrupt, observing that they were to determine at the hazard of an action, whether the questions were such as the person is bound to answer; and in *Perkin v. Proctor* (b) it is said, that if commissioners of bankrupts exceed their jurisdiction, the law gives a remedy against them. It will perhaps be argued on the other side, that, as commissioners of bankrupts are invested with power to act according to their discretion, they are not liable to an action; but in *Rooke's* case (c) it is laid down, that, although commissioners of sewers are to act according to their discretion, yet their proceedings ought to be limited and bound with the rule of reason and law. The same rule is applicable to commissioners of bankrupts. [*Holroyd J.* Different ideas have prevailed since that time; it was then thought that an action might be maintained against a sheriff for refusing a vote, although without malice; but the contrary has since been held (d); it has also been decided, that no action lies against commissioners for raising and paving a street, whereby the plaintiff's premises sustained damage. *Governor, &c. of Cast Plate Manufacturers v. Meredith.* (e)] It may be admitted, that if there had been a mere formal error in the commitment, that would not have made the commissioners liable to an action. *Bracy's* case. (f) But that was not the case here; the proceeding was substantially wrong; and *Miller v. Seare* (g) is expressly in point, to shew, that, under such circumstances, the commissioners are liable

1823.

Dozwell
against
Ingr.

(a) 9 Ves. 513.

(b) 2 Wils. 382.

(c) 5 Rep. 100.

(d) See *Cullen v. Morris*, 2 Stark. 577.

(e) 4 T. R. 794.

(f) Comb. 390.

(g) 2 W. Bl. 1141.

1823.

—
Dawson
against
Thurst.

to be sued in trespass. That case was not decided until it had been argued three times, and must, therefore, be received as a deliberate and well considered judgment; and the same point had not long before been ruled in *Dyer v. Missing*. (a) [Abbott C. J. It is very singular, that, in the judgment delivered by the Court in *Miller v. Sears*, you do not find any allusion to the words of the statute, giving the power in question. (b)] In two modern cases, *Davie v. Mitford* (c) and *Nobes v. Mountain* (d), where bankrupts who had been committed, brought actions of trespass against the commissioners, that ground of decision was never taken. The next point to be considered, is, whether the questions proposed were legal, and the answers satisfactory. [Abbott C. J. The statute requires, that the questions shall be answered to the satisfaction of the commissioners.] It is not necessary to contend for the old rule, that any direct answer is sufficient; but still, if the person under examination fairly answers, that he has no recollection of the matter about which he is questioned, that must suffice, for the Court will not require impossibilities. *Perrott v. Ballard*. (e) [Bayley J. That case was before the 5 G. 2. c. 30. was passed.] Still it shews what was to be considered as a reasonable answer to the question. *Miller's* case (f) is important as to this point; for it may be collected, from what is there said, that, unless the commissioners have grounds for imputing perjury to the party examined, they ought not to commit him. [Bayley J. May they not justly think his account unfair and un-

(a) 2 W. Bl. 1035.

(b) 5 G. 2. c. 30. s. 16.

(c) 4 B. & A. 356.

(d) 3 B. & B. 233.

(e) 2 Ch. Ca. 72. 7 Vin. Abr. tit. Creditor and Bankrupt, (P) pl. 13. S. C.

(f) 2 W. Bl. 881. 3 Wils. 420. S. C.

satisfactory,

satisfactory, although he does not commit perjury?] In *Perrott's* case (a), *Ex parte Nowlan* (b), and *Taylor's* case (c), the decision turned upon the credit to be given to the answers. (Several objections were then taken to the form of the warrant; but, as the Court did not pronounce any opinion as to them, that part of the argument has been omitted.)

1823.

DOSWELL
against
IMPEY.

Tindal, contra, was stopped by the Court.

Cur. adv. vult.

ABBOTT C. J., in the course of this term delivered the judgment of the Court.

This is an action of trespass for assaulting and imprisoning the plaintiff, and detaining him in prison, until he was discharged by one of the judges of this court, on a writ of habeas corpus.

The defendants have pleaded, first, the general issue, not guilty. Secondly, a justification by them, as the major part of the commissioners named in a commission of bankrupt issued against one *Sheriff*. This plea sets forth the commission, the adjudication of the bankruptcy of *Sheriff*, and his surrender to the commission; and then alleges, that the plaintiff was suspected by the commissioners to have concealed the property of the bankrupt; that he was summoned to be examined before the commissioners, and appeared, and was examined; and the plea sets forth the several questions proposed to him, and his answers thereto, as reduced into writing, and subscribed by him; that a subsequent

(a) 2 Burr. 1122. 1215.

(b) 6 T. R. 118. 11 Ves. 511. S. C.

(c) 8 Ves. 528.

1823.

 DOWELL
 against
 INFANT.

meeting was held, at which the plaintiff attended, and was further examined, and the several questions and answers, as reduced into writing, and subscribed by the plaintiff, are also set forth. The plea then alleges, that the answers so given by the plaintiff to the questions so proposed to him were not satisfactory to the defendants, and that they thereupon committed him to *Newgate*, by a warrant in writing containing all these matters, there to be detained, until he should submit himself to the major part of the commissioners, and full answer make to their satisfaction to the questions so put to him. The defendants have also pleaded a third plea, similar in substance to their second; and to these two the plaintiff has demurred.

There are also two general pleas of justification under the statutes, upon which issue has been joined. The demurrer came on for argument before us in *Easter* term last, and Mr. *Laws* was then heard on the behalf of the plaintiff. Some formal objections were taken, but we think there is no weight in them. Two important questions were raised: first, whether supposing the Court to think the answers given by the plaintiff satisfactory to our own minds, an action in the present form (that is an action of trespass *vi et armis*) can be maintained; and, secondly, whether the answers given by the plaintiff are satisfactory in the judgment of the Court. All the authorities tending to support the affirmative of the first question, directly or indirectly, were brought before the Court. We have considered the authorities and the reasons applicable to the case, and being of opinion, that upon the supposition mentioned in the first question, this action of trespass cannot be maintained, it is become unnecessary to hear
 any

any further argument, or to say whether we do or do not think the answers satisfactory; but it is due to the defendants to say, that upon this question persons equal in learning, integrity, and acuteness, may not unreasonably differ from each other. The general rule of law as to actions of trespass against persons having a limited authority (and commissioners of bankrupt are such persons,) is plain and clear. If they do any act *beyond* the limit of their authority, they thereby subject themselves to an action of trespass: but if the act done be *within* the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such action. This rule is mentioned and recognized by the Lord Chief Justice in the case of *Miller v. Seare and Others*. In the present case, the authority of the commissioners to call the plaintiff before them, and to examine him touching the effects of the bankrupt, and the legality of the questions proposed to him, are unquestionable; and according to the general rule that I have mentioned, the question properly is, whether a commitment by commissioners of bankrupt for not fully answering to *their* satisfaction lawful questions proposed by them to a party whom they have authority to examine, and upon a subject on which they have authority to inquire, be or be not *within* the limit of their authority. The answer to this question must be sought for and found in the statute, by which authority is given to the commissioners. The decisions of courts may and ought to be used as our guide in the exposition of the language of the statute; but a decision contrary to what appears to us to be the true sense and meaning of the statute, ought not to control our judgment. Such a decision there undoubtedly is;

1828.

 DOSWELL
 against
 LARRY.

1828.

Donnell
against
Jaffey.

is ; and we have paused and considered the subject again and again, in deference to the very high authority by which it was pronounced. It will be understood that I am alluding to the case of *Miller v. Seare and Others*, 2 *Sir W. Blackstone*, 1141., which is the only direct decision upon this point. That case, as reported, is open to some observation. It is clear that the warrant of commitment was bad on other grounds, and this circumstance would prevent the defendants from bringing a writ of error. One of the Judges, Mr. Justice *Gould*, founds his judgment on the other faults in the warrant ; they are also noticed by the other three Judges ; but their judgment, and particularly that of the Lord Chief Justice *De Grey*, is founded upon the point now in question. The case was argued no less than three times at the bar ; but all the reasoning both of the counsel and the judges proceeds rather upon general grounds, the general character and situation of commissioners of bankrupt, and the general nature and authority of their office and duty, than upon the particular authority given to them by the statute on the subject of examination and commitment. Indeed, the clause of the statute relating to this subject does not appear to have been distinctly quoted, or any comment pointedly addressed to its language and import. This decision, however, has, I believe, been generally considered as giving the rule of law on the subject, though certainly it has not been universally approved of. We think, as I have already intimated, that the question is to be decided by the language and import of the statute ; that is, of the statute 5 G. 2. c. 30. s. 16. One great object of the bankrupt laws is, to obtain a full discovery of the bankrupt's effects, for the purpose of distribution among the creditors ; and
a power

a power of examining persons suspected to be in possession of any of the effects of the bankrupt, or to be indebted to him, is given in the earliest statute, the 34 and 35 *Hen. 8. c. 4.*, to the Lord Chancellor and other great officers therein mentioned, and also to the commissioners by the 13 *Eliz. c. 7.* The penalty for not disclosing, and plainly declaring, and shewing the whole truth of such things as the party shall be examined of, is under each of these statutes, the forfeiture of double of the value of the goods or debts not disclosed. These provisions are evidently insufficient to the attainment of the proposed object. And the 10th section of the statute 1 *Jac. 1. c. 15.* recites, that "the commissioners have not good means, or other remedy by imprisonment or other penalty, to procure a person to appear before them, nor, having appeared, to make answer upon oath to such interrogatories as shall be ministered by them for the true declaration and knowledge of such lands, goods, and debts as be, or shall be suspected to be, in the custody, use, or possession of the person examined, or of any other to his knowledge, and of all debts owing to the bankrupt by the party, or any other to his knowledge and for remedying thereof enacts, that if any person suspected to have or detain any of the lands, goods, or debts of the bankrupt, or to be indebted to him, shall, after lawful warning, not come before the commissioners, or being come, shall refuse to be sworn, and to make answer to such interrogatories as shall be ministered unto him, according to the intent of the act of queen *Elizabeth* and of the present act, then that it shall be lawful for the commissioners, or the major part of them, to commit to such prison as they shall think meet, all such persons as so refuse to be sworn and make answer to such interrogatories; and also

1823.

Despatch
against
LAW.

to

1823.

DOSWELL
against
IMPT.

to issue their warrant to arrest such person as shall refuse to appear, and to bring him before them to be examined; and upon his refusal to come or to be examined, to commit the person so refusing to prison, until such time as the person so refusing to come, or to be sworn to answer, shall submit himself to the commissioners and be examined by them. This is in some respects a considerable enlargement of the powers given by the statute of *Elizabeth*. No further authority appears to have been given to the commissioners upon the subject of examination generally, until the statute 5 G. 2. c. 30. Two intermediate statutes, viz. the 4 and 5 Ann. c. 17., and 5 G. 1. c. 24., had provided for the examination of persons to prove the act of bankruptcy. These were temporary acts, and had been suffered to expire; and the proof of the act of bankruptcy is one of the subjects mentioned in the 5 G. 2. c. 30. This latter statute was made, as appears by the preamble, to remedy abuses, and to supply the defects and inconveniences of former laws relating to bankrupts. It contains provisions on several matters not connected with the present case. The 16th section, on which the present question arises, is manifestly intended to give to the commissioners larger powers than the older statutes had conferred upon them, and in that respect to supply defects in the law. The examination may be as well by word of mouth as by interrogatories in writing: the bankrupt himself may be examined, touching all matters relating to his trade, dealings, estate and effects: every other person duly summoned, or present at any meeting, may be examined touching all matters relating to the person, trade, dealings, estate and effects of the bankrupt, and any act of bankruptcy committed by him: verbal answers may be taken down
and

and reduced into writing, and the writing is to be signed and subscribed by the party examined. "And in case any such bankrupt or bankrupts, or other person or persons, shall refuse to answer, or shall not fully answer *to the satisfaction of the commissioners, or the major part of them*, all lawful questions put to him, her, or them by the said commissioners, or the major part of them, as well by word of mouth as by interrogatories in writing; or shall refuse to sign and subscribe his, her, or their examination so taken down or reduced into writing as aforesaid (not having a reasonable objection either to the wording thereof, or otherwise to be allowed by the said commissioners); it shall and may be lawful to and for the said commissioners, or the major part of them, by warrant under their hands and seals, to commit him, her, or them to such prison as the said commissioners, or the major part of them, shall think fit; there to remain without bail or mainprize, until such time as such person or persons shall submit him, her, or themselves to the said commissioners, and full answer make *to the satisfaction of the said commissioners*, to all such questions as shall be put to him, her, or them as aforesaid, and sign and subscribe such examination as aforesaid, according to the true intent and meaning of this act." The words are, *to the satisfaction of the commissioners*, not, *as ought to be*, or *as reasonably might be*, *to the satisfaction of the commissioners*, not *satisfactory* generally, but *satisfactory to the commissioners*: so that by the very words of the section, the commissioners are authorised to commit, if the party shall not fully answer *to their satisfaction* all lawful questions put to him. I would ask whether any man whose mind is not previously occupied by the legal distinctions between judicial and ministerial officers, between judges of courts of record

1823.

 DOSWELL
against
 IMPRY.

1823.

Decided
against
James.

record and judges of courts not of record, between superior and inferior tribunals, could entertain any doubt as to the meaning of this legislative enactment? We think all those distinctions are inapplicable to this special provision, which is so peculiar, that we are not aware of any authority expressed in similar language in any other instance. Distinctions, such as those that have been mentioned, might and would guide our judgment in the interpretation of doubtful words, but ought not to prevail against the plain sense of unambiguous language apparently used without any reference to them, if not in reality intended to supersede them. By the statute of *James*, the power to commit was only in case the party coming before the commissioners should refuse to be sworn, and to make answers to such interrogatories as should be ministered to him. It might, therefore, be contended, that a party who submitted to be sworn, and who made any answer, or at least any direct and plausible answer, to the interrogatories, could not be committed; and this would leave the intended object, a full discovery of the bankrupt's effects, in many cases unattainable. A further and more compulsory power was necessary to attain the object; this was one of the defects of former laws that required to be supplied. This defect will be supplied by the construction that we now give to the statute of *G. 2.*; but it will not be supplied, or at least not perfectly supplied, if the commissioners must acquiesce in such answers as the examinant may choose to give, although unsatisfactory to them, at the peril of an action to try whether they are satisfactory to others; for, if they acquiesce, there is no other power that can enforce a better answer. This construction also will alone give effect to all the words of the statute. Upon the other construction, the words

words "to the satisfaction of the said commissioners" will be wholly nugatory, and the statute will be interpreted as if it contained only the words, "shall not fully answer all lawful questions put to him," upon which words, if they stood alone, the commissioners would be subject to an action of trespass for committing a person, who, in the opinion of a superior court, should be thought to have made a full answer, because their authority would be limited to the commitment of those alone who did not fully answer. And it is a general and well established rule for the construction of statutes, and all other written documents, that effect is to be given to every phrase and word, if it can be reasonably done, and without repugnance to other passages, or to any known rule of law. And it should be further noticed, that, by the 43d section of this statute, the commissioners are required, before they begin to exercise their powers under any commission, to take an oath that they will faithfully, impartially, and honestly, according to the best of their skill and knowledge, execute the several powers and trusts reposed in them. Now if, in the best exercise of their skill and knowledge, they find the answers given not satisfactory to their own minds and judgment, will they act impartially, faithfully, and honestly, if they forbear to commit? And are they to be subject to an action of trespass if they do commit, in case the answers shall happen to be satisfactory to other minds and another judgment? We think the law cannot have intended to place them in such a situation. It will be observed, that we give our opinion only upon an action of trespass, as the present is, and upon the authority given to the commissioners by the statute, on this particular subject of examination and answer. The abuse of that authority, if any such shall occur, may undoubtedly

1823.

 DOSWELL
 against
 IMPRY.

1823.

—
DOWELL
against
IMPEY.

undoubtedly be punished by a criminal prosecution. Of the remedy to a party aggrieved by an action upon the case, we forbear to speak, because no such question is at present before us; and because, in the several instances that have been brought before the Judges by habeas corpus, no malevolent or criminal intention has ever appeared. Is a party then to remain in prison, if commissioners of bankrupt acting honestly in their judgment are not satisfied with such answers as appear satisfactory to other minds? Certainly not. The law has provided the means of liberation by the writ of habeas corpus, under which the opinion of the Lord Chancellor may be had at all seasons, the opinion of each of the three superior courts successively in term time, and of each of the Judges of those courts in vacation. And this stat. of 5 G. 2. c. 30. has studiously provided for the due effect of this writ, by requiring (in the 17th section) the commissioners to specify the questions in their warrant of commitment. By the 18th section, the court or judge before whom any person may be brought by virtue of this writ is required to recommit, notwithstanding any insufficiency in the form of the commissioners' warrant, unless it shall be made appear by the party committed *that he has fully answered all lawful questions* put to him by the commissioners; and consequently, if this be made to appear, he is to be liberated. The expression here used is "fully answered all lawful questions," not fully answered to *the satisfaction of the commissioners*; and the omission of those words in this place shews that they were not idly introduced into, but were intended to have effect in, the 16th section. For, taking the three sections together, the result of the whole manifestly is, that the commissioners are in the first instance to decide for themselves, and upon their own

own judgment, exercised under the sanction of an oath, whether the answers be to *their* satisfaction, and to commit if they be not so; but that as far as concerns the liberty of the person, their decision is to be subject to review, upon the general question, whether the answers be or be not satisfactory; that for the purpose of such review, the whole examination is to be set forth in the warrant; and if upon review by the superior tribunals, the answers be thought satisfactory, the party is to be liberated from his imprisonment. Our judgment in the present case is founded upon the words of the statute, as we understand and construe them. The words are applied to the case of the bankrupt himself, as well as that of other persons, and it may not be unfit to observe, that we think our construction best calculated to prevent the very numerous frauds and concealments in cases of bankruptcy, which have been so much complained of in modern times. For the reasons that have been given, the judgment of the Court on the demurrer must be for the defendants.

1823.

—
DOWELL
against
IMPEY.

Judgment for the defendants. (a)

(a) The discretion vested in the commissioners by the 10th section of the 5 G. 2. c. 30. has been considered to be of a judicial nature, and uncontrollable. In *Ex parte King*, 11 Ves. 417., the bankrupt petitioned the Lord Chancellor that he would direct the commissioners to sign his certificate; and the application was rejected, on the ground that the legislature had given the commissioners a right to exercise a judicial discretion. The bankrupt afterwards applied to the Court of King's Bench for a mandamus to the commissioners, but they refused the writ for the same reasons that had been assigned by the Lord Chancellor. 7 East, 91. After the failure of that attempt, the matter was brought before Lord Chancellor *Erskine*, who abided by the former decision, 13 Ves. 181.; and the motion having been renewed before Lord *Eldon*, he said, "I hold firmly to the opinion which I expressed upon a former application of this bankrupt, which was confirmed by Lord *Erskine* and by the Court of

1823.

DOWELL
against
IMPER.

King's Bench, that no court of justice has power to compel the commissioners to certify. They have a judicial discretion given to them by the act of parliament, and it is in vain to urge that there is no remedy. The law having intrusted them with this judicial discretion, no court can take it from them; and if any mischief arises from it, a remedy must be sought elsewhere, and cannot be supplied by those who are to interpret, and not to create the law. The provision which entrusts the commissioners with a judicial authority and discretion is thus expressed, 'that the certificate shall not be granted, unless the commissioners certify that there doth not appear to them any reason to doubt the truth of such discovery, or that the same is not a full discovery of all such bankrupt's estate and effects.' "

15 Ves. 126.

Tuesday,
January 28th.

REX against THOMAS POYNDR, Sen.

A., B., and C. carrying on trade in partnership, had a dwelling-house, yard, and premises, in a parish in London; all the partners were in the habit of frequenting the premises daily for the purpose of business, but none of them resided there. The dwelling-house was inhabited by a clerk, who managed the business for them, but the rent, rates, and taxes were paid by the firm: Held, that each of the partners was a householder within the 43 Eliz. c. 2, and liable to serve the office of overseer.

INDICTMENT against the defendant, for refusing to take upon him the office of overseer of the poor of the parish of *St. Ann's, Blackfriars*. Plea, not guilty. At the trial, before Abbott C. J., at the London sittings after last *Michaelmas* term, the only question was, whether the defendant was a householder, within the meaning of the 43 *Eliz. c. 2*. It appeared that the defendant, *William Hopson*, and *Thomas Poynder* the younger, were lime merchants and co-partners, and were the owners of a dwelling-house, yard, premises, and building in *Earl-street*, in the parish of *St. Ann, Blackfriars*, in the city of *London*, but that neither of them ever slept there, the defendant and *Poynder* the younger dwelling at *Clapham Common*, and *Hopson* at *Stamford-hill*, in the parish of *Tottenham*, in the county of *Middlesex*. One *Medlicott*, who managed the business for them, resided

in

in the house in *Earl-street*. The rent, rates, and taxes were paid by the firm. Each of the partners frequented the premises daily, for the purpose of business, and the defendant had once voted at an election of a lecturer, which was a privilege belonging to resident householders. It was contended at the trial, that the defendant was not a householder within the statute of *Elizabeth*. The Lord Chief Justice was of opinion that he was, and a verdict was found for the crown.

1823.

—
The King
against
Portman,

Drazen Common Serjt. now moved for a new trial. In the late case of *Bar v. Hall (a)*, this Court decided that one of several partners resorting daily for the purposes of business to a house rented by all, but which was inhabited by their servant, was a householder in the place where the house was situate, so as to qualify him to be a commissioner of a court of requests. The object of the statute in that case was to confer a privilege. The object of the 43 *Eliz.* was to impose a burden on the persons therein described. A different rule of construction ought therefore to prevail here. By the 59 *G. 3. c. 12, s. 6*, it is enacted, "that justices in special sessions may, at the request of the inhabitants of any parish, appoint any person who shall be assessed to the relief of the poor thereof, and shall be a householder *resident* within two miles of the church or chapel of such parish, to be an overseer, although he should not be a householder within the parish of which he should be appointed overseer." It seems therefore to have been the intention of the legislature, that an overseer should be a resident householder within a certain distance of the

(a) *Ante*, 125.

1823.
 ———
 The King
 against
 POTTER.

parish, though not actually resident in the parish. Here the defendant resided more than two miles from the parish of *St. Ann, Blackfriars*. Besides, he was undoubtedly a householder in *Clapham*, and might therefore be called upon to serve in two places at the same time an office requiring personal attendance. In an indictment for burglary this might be laid to be the house of *Medlicott*. In *Margett's* case (a) the house was occupied by the agent of a trading company, and he resided in it with his family, only for the purpose of conducting the trade. The lease was held, and the rent and taxes paid by the company. Yet *Graham B.* and *Grose J.*, at the *Old Bailey* sessions, 1801, held an indictment to be good, which stated the burglary as being committed in the dwelling-house of the agent.

Per Curiam. When a similar question was under our consideration last term, we were not insensible that a distinction might be attempted to be made between those cases where the legislature intended to confer a benefit, and others where it intended to impose a burden. We were of opinion that there was no foundation for such a distinction, and that the same rule of construction ought to prevail in all cases. We have no doubt in this case that the defendant is a householder within the meaning of the statute of *Eliz.* It was in evidence that he had enjoyed one of the privileges of a resident householder; for he had voted for a lecturer, which was a privilege belonging to resident householders only.

Rule refused.

(a) 2 *Leach's Crown Cases*, 950., 4th ed. See the observations made on this case by Mr. Russell, in his *Treatise on Crimes*. See also *Ex v; Stock*, 2 *Leach*, 1015.

1823.

CRAWSHAY and Others *against* EADES.Tuesday,
January 28th.

TROVER for 20 tons of iron. Plea, not guilty.

At the trial, before *Abbott C. J.*, at the *London* sittings after last *Michaelmas* term, the following appeared to be the facts of the case. The plaintiffs were iron merchants in *London*; the defendant was a common carrier by water, and for several years had been in the habit of carrying iron along the line of canal from the *Brierly-hill* iron works, belonging to *W. Hornblower*, situate near *Stourbridge* in *Worcestershire*, to *Brentford* in *Middlesex*, and there shipping it in other boats belonging to the plaintiffs, in which it was conveyed to their premises in *London*, and the plaintiffs, during the same time, had been in the habit of sending large quantities of foreign iron by the defendant's return-boats, to *Hornblower*. The practice, as proved by the plaintiff's own witness, had been, to deliver to the carrier, when the iron was shipped, a ticket specifying the quantity, and upon arrival at *Hornblower's* wharf, to weigh it, and to give the carrier a receipt for the quantity so weighed and delivered. On the 26th *January*, 1822, the plaintiffs loaded at *Brentford*, on board two barges belonging to the defendant, 348 bars of iron, and delivered the following ticket: "Shipped 348 bars of iron, weight 205. 0. 20., for Messrs. *Hornblower*, *Brierly-hill*, near *Stourbridge*, from *R. and W. Crawshay and Co.*" The iron was sent to *Hornblower* on sale. On the 8th *February* the barges with the iron arrived at *Hornblower's* works, and on the 9th a part out of each

A. delivered a quantity of iron to a carrier to be conveyed by the latter to *B.*, the vendee in the country. The carrier having reached *B.'s* premises, landed a part of the iron on his wharf, and then finding that *B.* had stopped payment, re-loaded the same on board his barge, and took the whole of the iron to his own premises: Held, that there was no delivery of any part of the iron so as to divest the consignee of his right to stop in transitu, the special property remaining in the carrier until the freight for the whole cargo was either tendered or paid, or until he had done some act shewing that he assented to part with the possession of the goods without receiving his freight.

1823.

CRAWFORD
against
EADEN.

of the barges was landed upon his wharf. The defendant then hearing that *Hornblower* was gone off, enquired of his confidential clerk, who informed him that it was all over with the *Brierly* works, and told him that he the defendant had better take the iron on his own account. The defendant, in consequence, reshipped the part that had been landed, and conveyed the whole to his own premises. He afterwards sold part, in order to discharge *Hornblower's* debt to him, and delivered the residue, under an indemnity, over to the assignees, under a commission of bankruptcy, which had issued against *Hornblower*. It appeared that *Hornblower* had been in the habit of paying the freight for the iron shipped by himself, as well as for that shipped by the plaintiffs. The defendant having given notice that all goods retained by him for carriage would be retained, not only for the particular carriage, but for all arrears, claimed, in the first instance, to retain the iron in question for his general balance. The Lord Chief Justice was of opinion at the trial, that there was no actual delivery to *Hornblower* of any part of the iron, so as to divest the plaintiff of his right to stop in transitu, and the jury found a verdict for the plaintiff for the value of the iron. It was now stated in an affidavit, that it had never been the usage to weigh the iron, or give a receipt for it at *Hornblower's* wharf; and the witness who at the trial gave evidence to that effect now swore that it was by mistake.

Marryat now moved for a new trial. Here there was a complete delivery of part of the iron to *Hornblower*, for it was landed upon his wharf. Nothing remained to be done on the part of the seller. [*Abbott* C. J. The freight of the goods was to be ascertained by

by weighing, and they had not been weighed.] It appears by the affidavit, that it was not the practice, as between these parties, to weigh the iron, in order to ascertain the freight, nor to give a receipt to the carrier; and if so, then there was a delivery of part; and by a delivery of part of one entire cargo by the master of a ship to the consignee, the property in the whole completely vests in him, and the consignor cannot stop in transitu.

1823.

 CRAWFORD
 against
 RADFORD.

ABBOTT C. J. The whole question in this case is, whether there had been a delivery or not. There is no case in which a carrier having begun to deliver, and afterwards discontinued, has been held to have made a complete delivery of any part of the goods. The case attempted to be established by the defendant is, that he for his own benefit shall be allowed, as against the assignees of *Hornblower*, to say that he had not delivered the goods, so as to retain his lien; and as against the plaintiffs, that he had delivered them, so as to take away their right to stop in transitu.

BAYLEY J. It is quite clear, that if the iron was once completely delivered to *Hornblower*, the transitus was at an end, and his assignees would be entitled to retain it. It is incumbent on them, however, to shew clearly, that such a delivery had been made by the carrier to the vendee, as would deprive the former of his lien; for nothing less than that could take away from the vendor his right to stop in transitu. There can be no doubt, that wherever there is a complete delivery of part of one entire cargo to the consignee, the transitus is ended, and the consignor cannot stop the remainder.

1823.

CRAWFORD
against
EADES.

But in this case there was no complete delivery of any part of the iron to *Hornblower*. The goods were in different barges, and a part of the iron was taken out of each barge and landed upon *Hornblower's* wharf, but he had not taken possession of it, nor was it weighed; so that the amount of the freight due to *Eades* might be ascertained. Now, independently of any particular usage, a carrier has, by the common law, a right to insist that the goods shall be weighed, in order, first, that it may be ascertained for his own security that he has delivered the precise quantity entrusted to him; and, secondly, that the amount of the freight, if it depend upon the weight, may be ascertained. When part of the iron was landed upon the wharf, it might more properly be considered as in a course of delivery, than as actually delivered. By placing it upon the wharf, the carrier did not mean to assent to *Hornblower's* taking it away without paying the freight. Besides, a carrier has a lien on the entire cargo, for his whole freight; and until the amount is either tendered or paid, the special property which he has in his character of carrier does not pass out of him to the vendee, unless, indeed, he does some act to shew that he assents to the vendee's taking possession of the property before the freight is paid. It is clear, upon the facts given in evidence at the trial, that the carrier never did assent to *Hornblower's* taking possession of this property, for he reships the part of the iron that was landed, as soon as he is informed that the freight is not likely to be paid. In order to divest the consignor's right to stop in transitu, there ought to be such a delivery to the consignee, as to divest the carrier's lien upon the whole cargo. I am of opinion, therefore, that the entire freight not having been tendered or paid, the delivery in this case was not complete

plete as to any part; that the special property remained in the carrier; and that the consignor was not deprived of his right of stoppage in transitu.

1823.

CHAWINAY
Against
EABLE.

HOLROYD J. I am also of opinion, that there was not in this case a delivery to the consignee of any part of the iron, so as to divest the consignor's right to stop in transitu. By common law, the carrier had a right to insist, before he parted with the possession of any part of the iron, that it should be weighed, so that the precise quantity delivered and the freight due thereon might be ascertained. Until that was done, *Hornblower* could not say that the property had passed to him from the carrier. That being so, the property still remained in the carrier. The delivery to the consignee was not then complete, and, consequently, the transitu was not ended, and the plaintiffs were entitled to recover.

BREW J. I am of the same opinion. There can be no doubt, that wherever there is a complete delivery of any part of one entire cargo, by a carrier to the consignee, the property in the whole vests in the latter, so as to take away from the consignor his right to stop in transitu. The question is, whether there was any actual delivery of any part of the cargo to the consignee. Until the carrier parts with the possession of the goods, the special property which he has in that character remains in him; and it is clear, that he is entitled to retain possession until the freight due to him is tendered or paid. He may, however, assent to the consignee's having possession of the goods without payment of the freight; but it is clear, that in this case he never did so assent; for when he was informed that *Hornblower*

was not to be paid for the goods, he refused to deliver them.

1823.

CRAWFORD
against
EADLES.

works had stopped, he immediately reshipped the part of the iron which had been landed, and conveyed the whole to his own premises. The freight, therefore, not having been tendered or paid, and the carrier not having intended to part with the possession, without payment of the freight, his lien still continued. The property, therefore, had not passed from him to the consignee, and, consequently, the consignor had a right to stop in transitu.

Rule refused. (a)

(a) See *Northey v. Field*, 2 Esp. 613.; and *Nix v. Olive*, Abb. on Shipp. 402.

Wednesday,
January 29th.

PRINCE against CLARK.

A. consigned goods for sale to *B.*, the captain of an *Indiaman*, bound on a voyage to *Calcutta*, and directed him to invest the proceeds in certain specified articles, or in bills at the exchange of the day. *B.* sold the goods at *Calcutta*, and invested the proceeds in sugar, which was not one of the articles specified in his instructions, and

informed *A.* of the purchase by a letter, which the latter received on the 29th May. *B.* had no commercial establishment in this country, but by a memorandum on a promissory note given by him to *A.* before he sailed for *India*, it appeared that one *C.* had acted as his agent in some insurance transactions. On the 7th August, *A.* notified to *C.* that he would not accept the sugars, and advised the latter to insure them. *C.* declined to interfere, alleging that he had no knowledge of any transactions between *A.* and *B.*: Held, upon these facts, in an action brought by *A.* to recover the proceeds of the goods shipped by him, that the jury were well warranted in finding that *A.* had assented to the purchase made by *B.*

ACTION for money had and received, money paid, &c. against the defendant, as surviving partner of one *E. H. Coffin*. There were counts charging the defendant alone. Plea, non-assumpsit. At the trial, before *Abbott C. J.*, at the *London* sittings after last term, the following appeared to be the facts of this case. On the 12th May, 1821, the plaintiff shipped on board the ship *Ajax*, which was then lying in the river *Thames*, bound for *Calcutta*, a quantity of cloths and other articles. The defendant *Clark* was the captain, and *Coffin* the purser of that vessel. The plaintiff, on the same day, by a letter of instruction, informed *Clark* and

Coffin

Coffin that he had consigned the goods to their care, to dispose of them at any place they thought best for his interest; and he directed them to invest the proceeds in certain other goods specified in the letter, if they could be procured at prices likely to bear a profit; if not, they were to buy bills at the exchange of the day. The *Ajax* having arrived at *Calcutta*, *Clark* and *Coffin* sold the plaintiff's goods, and with the proceeds purchased 260 hogsheads of *Benares* sugars, that not being one of the specified articles in which the returns were directed to be made by the letter of instructions. By letter of the 17th *January*, 1822, the defendant informed the plaintiff of the shipment of the sugars on board the *Fame*, and transmitted a bill of lading, and alleged the low rate of exchange as a reason for purchasing sugars. The plaintiff received this letter on the 29th of *May*, 1822. In *May*, 1821, *Clark* and *Coffin* had purchased of the plaintiff a quantity of goods, and they gave him in payment their promissory note, dated the 16th *May*, 1821, for 86*l.*, payable eighteen months after date. There was a memorandum on the note, that the policy of insurance was in the hands of *H. Leigh*, Esquire, *Old South-sea House*. *Leigh* was the brother-in-law of the defendant, and the plaintiff was acquainted with that fact. *Clark* and *Coffin* had no commercial establishment in this country. On the 7th *August*, 1822, the plaintiff's attorney wrote to Mr. *Leigh*, as the agent of *Clark* and *Coffin*, and informed him that the plaintiff declined accepting the sugars, on the ground that *Clark* and *Coffin* were not authorised to invest his property in the purchase of sugars, and advising him, *Leigh*, to insure the sugars, on account of any person who might be interested therein. On the same day, *Leigh* replied that he had

1823.

 Parties
 against
 Quank.

1823.

 PRINCE
 against
 CLARK.

had no knowledge of any goods having been sent to *India* by the plaintiff, under the care of *Clark and Coffin*, nor of any shipment of sugars made by them on account of the plaintiff; that he, *Leigh*, was only their private agent, and that he should not interfere. The *Pame* sailed from *Calcutta* on the 3d *February*, 1822, and was lost on the 14th of *June*, at the *Cape of Good Hope*. Intelligence of that event reached *London* on the 26th *August*. The defendant, *Clark*, afterwards delivered to the plaintiff an account current, in which the proceeds of the plaintiff's goods were admitted to have been 689*l.*, and the costs of the sugars were charged to his account. The Lord Chief Justice directed the jury that the plaintiff was bound to notify his dissent within a reasonable time to the agent of *Clark and Coffin*, in this country, if he had any means of doing so; and he left it to them, upon the evidence, to find, whether, as the plaintiff knew that *Leigh* was the brother-in-law of *Clark*, and that he had certainly been their agent in some insurance transactions, he ought not to have notified his rejection of the sugars to him; and if so, whether, under the circumstances, that dissent was notified in time. The jury having found a verdict for the defendant,

Scarlett now moved for a new trial. The only ground upon which it has been held necessary to give notice of dissent to an agent who has deviated from his instructions is this, that the principal may not sustain a prejudice by the want of it. Here, then, the plaintiff was not bound to give any notice of his intention to repudiate the purchase; for *Clark and Coffin* could not be prejudiced by the want of it, as it did not appear that they

they had any agent in *England* authorised to insure the goods, or that any person receiving the notice would have acted for their benefit. *Leigh* clearly had no such authority. It was the duty of *Clark* and *Coffin*, when they announced the purchase, either to have directed the plaintiff, if he repudiated it, to insure on their account, or to inform him who their agent was. *Clark* and *Coffin* had no commercial establishment in *England*. The evidence was not sufficient to shew that *Leigh* was their agent, or that there was any other house in *England* to whom notice ought to have been given.

1823.

 PRINCE
against
CLARK.

ABBOTT C. J. I am of opinion that there ought not to be a new trial in this case. The plaintiff certainly was not bound to accept the sugars. It was his duty, however, to notify his rejection of them within a reasonable time after he received intelligence of the purchase, if there was any person here to whom that notice could be given. The jury have found, upon the question submitted to them, that *Leigh* was a person to whom notice ought to have been given; and that it was not given within a reasonable time.

BAYLEY J. I think that there is not any ground for disturbing the verdict in this case. It appears by the evidence, that *Coffin* and *Clark* were directed to purchase with the proceeds of the plaintiff's goods certain specified articles, if likely to produce a profit; if not, they were to purchase bills at the exchange of the day. Contrary, however, to their instructions, they purchased, with the proceeds of the plaintiff's goods, *Benares* sugar, which was not one of the specified articles. In so doing, they might perhaps have acted beneficially for their employer;

1823.

Plaintiff
against
Clark.

employer; but the purchase not being authorised by the principal, it was competent to the latter either to adopt or repudiate the act of the agents. The principal, however, has no right to pause and to wait the fluctuation of the market, in order to ascertain whether the purchase is likely to be beneficial or prejudicial; he is bound, if he dissents, to notify his determination within a reasonable time, provided he has an opportunity of doing so. In this case, the letter announcing the purchase arrived on the 29th May. Assuming that the plaintiff did not know that *Coffin* and *Clark* had any general agent in *London*, it was his duty to make inquiries. It is in evidence, that he knew *Leigh* to be the brother-in-law of *Clark*, and he might certainly have learnt from the memorandum on the promissory note in his possession that *Leigh* had been the agent of *Coffin* and *Clark* in some insurance transactions. It did not appear that the plaintiff had any other knowledge upon that subject on the 7th August than that which he possessed upon the 29th May. I am of opinion, that the plaintiff's neglect to make inquiry from the 29th May to the 7th August was evidence to go to the jury, to shew that he acquiesced in the purchase of the sugars made by *Coffin* and *Clark*.

HOLROYD J. I am of opinion that there is no ground for granting a new trial. It is true, that *Coffin* and *Clark* did not conform to the instructions they received, as to investing the proceeds of the plaintiff's goods. Circumstances might possibly exist to justify an agent in not strictly pursuing his instructions. It might possibly be ruinous to his principals to pursue them. *Coffin* and *Clark*, in this case, having deviated from their instructions,

structions, gave the plaintiff notice of the purchase which they had made; and the only question is, whether he ever assented to the act done by them, which might or might not in the event turn out to be beneficial. If he did assent, it is quite clear that he cannot succeed in the present action; and if there was reasonable evidence to satisfy the jury that he did assent, the present verdict is right. The letter communicating the purchase of the sugars was received by the plaintiff on the 29th *May*, and he then, knowing that his instructions had not been pursued, does not give any notice that he dissented from the purchase made on his account, until the 7th *August*; and it appears, that on the 29th *May* he had all the information concerning *Leigh* which he had on the 7th *August*. On that day he does treat *Leigh* as the agent of *Coffin* and *Clark*. I think, therefore, that the jury might fairly infer, from the facts of this case, that the plaintiff did once assent to take the cargo on his own account, or that he meant at least to take the chance of the market. They might presume that something had happened between the 29th of *May* and the 7th of *August*, to alter the intention which he had once formed. I think, therefore, that the verdict was right, even if *Leigh* turned out not to be authorised to act as the agent of *Clark* and *Coffin*.

1828.

PRINCE
against
CLARK.

BEST J. concurred.

1823.

Wednesday,
January 29th.

MILNE against GRAHAM.

A promissory note made in Scotland is negotiable in England, and an action may be maintained upon it by the indorsee against the maker.

ACTION by the indorsee against the maker of a promissory note. At the trial, before *Abbott C. J.*, at the *London* sittings after last term, it appeared, that the note was made at *Dundee* in *Scotland*, and it was objected, that an action was not maintainable by the indorsee of a promissory note against the maker, except where the note is made in *England*. The words of the 3 & 4 *Anne*, c. 9., are, "that all notes whereby any person promises to pay to any other person any sum of money, shall be construed to be payable to any such person to whom the same is made payable; and that every such note shall be assignable and indorsable over in the same way as *inland* bills of exchange are by the custom of merchants; and that the person to whom the money is payable may maintain an action for the same, in such manner as he might upon any *inland* bill of exchange; and the person to whom the same is indorsed or assigned may maintain an action, either against the person who assigned the note, or against any of the persons who indorsed the same, as in the case of *inland* bills of exchange." It was contended, that the statute only contemplated inland promissory notes; and if so, that a promissory note made in *Scotland* was to be considered a foreign note, and not within the statute; and *Selwyn's Nisi Prius*, 377., was referred to. The Lord Chief Justice overruled the objection, and the plaintiff had a verdict. *Chitty* now moved for a new trial, and urged the objection taken at the trial.

Per

Per Curiam. This is both within the words and the spirit of the act. The words are, "all notes." The act was made for the advancement of trade, and ought, therefore, to receive a liberal construction. It is for the advantage of commerce that foreign as well as inland notes should be negotiable. This is, therefore, within the spirit of the act.

1823.

MILNE
against
GRAHAM.

Rule refused.

GUNSON and Others, Assignees of GOLDING, a
Bankrupt, against METZ.

Thursday,
January 30th.

DECLARATION upon a bill of exchange for 160*l.* made the 18th *September*, 1816, drawn by the defendant upon and accepted by *J. Edward Senate*, payable twelve months after date, indorsed to *J. Kinnear*, and by him to the plaintiffs, as assignees of *Golding*. Plea, non-assumpsit. At the trial, before *Abbott C. J.*, at the *London* sittings after last term, the plaintiffs proved the hand-writing of the acceptor and of *Kinnear* the first indorser, presentment to the acceptor, and refusal to pay, they did not prove any notice of dishonour to the defendant, but gave in evidence an agreement made between him and *Kinnear*, on the 15th of *May*, 1818, by which, after reciting that the defendant had indorsed and drawn various bills of exchange, which were therein specified, (one of them being the bill in question,) and which were then all overdue, and which were or ought to be in the hands of the said *Kinnear*; it was agreed by *Kinnear* that he would accept and take from the defendant

In an action by the indorsee against the drawer of a bill of exchange, the plaintiff did not prove any notice of dishonour to the defendant, but gave in evidence an agreement made between a prior indorser and the drawer, after the bill became due. It recited, that the defendant had drawn among others the bill in question, that it was over due, and ought to be in the hands of the prior indorser; and that it was agreed that the latter should take the money due to him upon the bill

by instalments: Held, that this was evidence that the drawer was at that time liable to pay the bill, and dispensed with other proof of notice of dishonour.

1823.

GUNSON
against
MARR.

the sums of money that might be due to him upon all or every of the said bills of exchange, by the weekly payment of 1*l*., until the whole should be fully paid and satisfied, and should give credit to the defendant for any sums that he might receive from any of the persons liable to pay the said bills, and that he would not take any legal proceedings against the defendant upon any of them, and that all proceedings already commenced should be put an end to, until default should be made in the said weekly payment of 1*l*. The Lord Chief Justice was of opinion, that the recital in the agreement was an acknowledgment by the defendant that he was then in such a situation as to be liable to pay the bill, and consequently, that he had received notice of dishonour, and the plaintiff obtained a verdict.

Platt now moved for a new trial. The recital in the agreement does not dispense with the necessity of proving notice. *Kinnear* could not have recovered upon this agreement any thing beyond that which was legally due to him upon the bills. Now if he had paid the bill in question, after being exonerated from his liability by want of notice, it would have been a payment in his own wrong, and would not have given him any claim against this defendant; the plaintiff, therefore, cannot stand in a better situation. The agreement does not operate as a waiver of the objection; for in all cases of waiver, the fresh promise has been made to the party holding the bill. In this case it appeared also at the trial, that the defendant had been damnified by the want of notice, for he had taken the benefit of the insolvent act, and not having any notice of the dishonour of the bill, he did not know who was the holder, and could not,

not, therefore, give notice to him of his intention to take the benefit of the act so as to bar the debt.

1823.

Guise
against
Mass.

Per Curiam. The recital in the agreement is evidence that notice of dishonour was given to the defendant; for if notice had not been given, nothing could become due upon the bill from the defendant; the latter, therefore, would not have agreed to pay *Kinnear* whatever was due upon this particular bill, but would have insisted upon a discharge.

Rule absolute.

ABSON against FENTON and Another.

Friday,
January 31st.

TRESPASS for breaking and entering plaintiff's close, subverting the soil, laying waggon-ways, digging trenches, and raising banks and ramparts there. Pleas, first, not guilty; secondly, that the locus in quo was parcel of the waste lands mentioned in a private act of parliament, made for the purpose of inclosing the waste lands in the manor of *Wakefield*, whereof the Duke of *Leeds* was lord, and thereby intended to be divided and inclosed; by which said act it was, amongst other things, enacted, "that the then Duke of *Leeds*, his heirs and assigns, should and might from time to time,

A private act of parliament for inclosing the waste lands of a manor reserved to the lord and his assigns all mines, &c., together with all convenient and necessary ways &c., then already made, or thereafter to be made, and liberty of laying waggon-ways, &c. at his and their free will and pleasure, and to

do all such other works, acts, and things as might be necessary or convenient for the full and complete enjoyment thereof, in as full, ample, and beneficial a manner as if that act had not been made. An action of trespass having been brought against the lord's assignee for laying a waggon-way over one of the allotments in an improper direction and manner: it was held, that the real question to be decided by the jury was, whether the waggon-way had been laid in such a direction as a person of reasonable skill would have selected; and whether the mode adopted was such as a prudent person would have adopted if he had been making the road over his own land, and not over the land of another.

1823.

—
 Answer
 against
 Fenton.

and at all times thereafter, have, hold, win, work, and enjoy all mines, coal, ironstone, and minerals, of what nature or kind soever, and all his then present open working stone-quarries, then working by himself or his tenants, within and under the said commons, encroachments, and waste grounds; together with all convenient and necessary ways, way-leaves, roads, and passages, then already made and thereafter to be made, and liberty of laying, making, and repairing waggon-ways and other ways, in, over, and along the same or any of them, or any part thereof, and of searching for, winning, and working the said mines and minerals, and loading and carrying away the coal, ironstone, lead, minerals, things, and other produce thereof, and of making pits, shafts, pit-rooms, and heap-rooms, drifts, levels, ways, and watercourses, (as well as using and continuing those already made,) and of erecting and using fire-engines and other engines, and of altering, changing, pulling down, and carrying away the same, or any of the materials thereof, and to have and use the stone got in the course of sinking pits or shafts, or working and getting the said minerals so reserved as aforesaid, at his and their own free will and pleasure; and to do all such other acts and things, either then in use or thereafter to be invented, as might be necessary or convenient for the full and complete enjoyment thereof, in as full, ample, and beneficial a manner, to all intents and purposes, as he or they could or might have done in case that act had not been made; the person or persons who for the time being should be owners or proprietors of the ground whereon such pits or soughs should be made, driven, or worked, or such engines, machines, or buildings erected, or such coals or rubbish laid, or such ways,

ways, roads, or passages made and used, being allowed and paid a reasonable satisfaction for damages, to be settled and ascertained as thereafter directed;" and that the locus in quo was part of the waste lands divided and allotted under that act. The plea then set out a demise by the Duke of *Leeds* to defendant *Fenton*, of the coal, under part of the said wastes, and that it was convenient for him to make a waggon-way over the locus in quo; that it was necessary to make excavations and throw up ramparts, in order to preserve the level of the waggon-way, and that those were works, acts, and things which the Duke of *Leeds* might have done, if that act had not been made; wherefore *Fenton*, in his own right, and the other defendant, as his servant, did the acts complained of, as they lawfully might, &c. Replication, de injuria, &c. and new assignment, that the defendant broke and entered the said close, dug pits, made ramparts, &c. on other and different occasions, and for other and different purposes than those mentioned in the said second plea, and in more and other parts of the said close, and in other directions and other modes than were necessary and proper for the reasonable enjoyment of the said powers, liberties, and privileges, reserved by the said act of parliament. Issue on the replication, and plea of not guilty to the new assignment. At the trial, before *Bayley J.*, at the last *Spring* assizes for *Yorkshire*, it was proved for the plaintiff, that the defendants had laid a waggon-way across the close in question, and, in order to preserve the level where the ground was low, had excavated a large quantity of soil from each side of the proposed way, which was thrown up into an embankment or rampart. The defendant proved his title, as

1823.

Answer
against
Fenton.

1823.

Asson
against
Fawcett

set out in the second plea, and a great deal of evidence was produced on each side; as to the propriety of making the waggon-way in the direction and manner that had been adopted. The learned Judge left it to the jury to say, first, whether the road had been carried in a proper and convenient direction; secondly, if the direction was improper, what damage the plaintiff had thereby sustained; thirdly, whether excavating the adjoining soil was a reasonable mode of making the embankment; and fourthly, what damage the plaintiff had sustained by reason of the soil for the embankment having been excavated from the close, instead of being brought from some other place. The jury returned their verdict as follows: "We are of opinion that it would have been difficult to find a more eligible line of road than passing through the plaintiff's field; but that it would have been less injurious to the land and equally convenient to the defendants, if it had been carried nearer the line of the lock rail-road. We find that the plaintiff has suffered some damages by the removal of the soil to make the embankment, and assess the damages at 10*l*.; and that that was not the most convenient mode of making the embankment." In *Easter* term last, *Scarlett* obtained a rule to shew cause why the verdict should not be set aside and a new trial had; on the ground that the jury ought not to have been called upon to say, whether the plaintiff had sustained some injury, which might by possibility have been avoided; but whether the defendant intended to adopt the most convenient and least injurious mode of laying his waggon-way. On a former day in this term,

Hullock

Hullock Serjt., Littledale, and Brougham, shewed cause. The question for the decision of the Court is, whether the right which existed in the Duke of *Leeds* before the act of 33 G. 3., for inclosing the waste lands in the manor of *Wakefield*, passed, exists now to the extent which has been claimed. It may be conceded, that, before that act, the Duke being lord of the manor might by virtue of his right to the soil of the wastes lay waggon-ways across them and excavate the soil on either side, and to any extent at his will and pleasure, provided he left sufficient pasture for the commoners. But the right which he and his assigns now have depends upon the construction of the act in question. Now, in construing acts of this nature, the Court must endeavour to discover the intention of the parties; for, although made public for certain purposes, yet they are private in their nature, and rather resemble agreements between the parties than acts of the legislature. The act in question contains a clause which secured to the Duke of *Leeds* a remuneration for the right which he before had to the soil of the wastes, and he actually received under the award of the commissioners one-sixteenth part of the common lands in lieu of that right, which was therefore extinguished as to all the other allotments. Hence it follows, that the privilege of laying waggon-ways, &c., which the Duke of *Leeds* and his assigns before enjoyed, as necessarily arising out of his ownership of the soil, now depends upon and is restricted by the words of the statute, which must receive the same interpretation as if found in a grant or reservation. Now if the Duke of *Leeds* being seized in fee of the close in question, had sold it, reserving a right of way, or had received a

1828.

 Answer
 against
 Fenton.

1823:

—
 ASHON
 against
 FENTON.

grant of such right from another person in the terms used in the act, then, according to the case of *Senhouse v. Christian* (a), he would only have had a right to make a waggon-way in the usual mode, and not to make such excavations as formed the subject of this action. The grantee of a right of way cannot dig up the adjoining soil to make an embankment or to repair the road; if he might dig up the soil, it would be difficult to maintain that he might not also open a quarry for the same purpose, yet that would be exercising not only a right of way, but a right of destroying the field through which it runs; again, if trees were growing on the adjoining land, the right contended for would extend to give the Duke and his assigns a right to cut and use them for the purpose of laying the waggon-way. It may be admitted, that he had a right to make the road in any mode that he pleased, and to fill up the hollow so as to preserve the level; but then he should have brought his materials to the spot from some other place, and ought not to have taken those which he found in the adjoining field; for, although that might be convenient, yet it was not necessary to the making of the road. Perhaps it will be contended, that the act authorises the Duke and his assigns to do "all other matters and things that might be necessary or convenient;" but, if "matters and things" are there held to apply to the making of roads, that part of the clause must be construed by the former part of it, which gives him a right to all convenient *and* necessary ways, which shews that the word *or* in the latter part of the clause must be construed in the conjunctive, and that

(a) 1 T. R. 560.

the thing done must be necessary as well as convenient, or it will not be within the meaning of that clause. And it has been found by the jury that there was another direction in which a waggon-way might have been laid equally convenient to the defendant, and less injurious to the plaintiff; the defendant, therefore, cannot justify making the way in question as a convenient and necessary way. [*Bayley J.* Suppose the clause in question to operate as a grant; if the mode in which the act complained of has been done, was adopted *bonâ fide* as the most convenient and least injurious that could be selected, does not the compensation-clause apply so as to preclude the plaintiff from maintaining an action of trespass?] That clause cannot affect the present question, for the compensation is to be made for things done by virtue of the act, so that it still remains to be decided whether the Duke of *Leeds* and his grantees were authorised to make a rail-way in the manner which they have adopted. The legislature never could have intended to make the commissioners a tribunal for trying all cases of trespasses that might be committed upon the allotments made to the commoners.

1823.

Abbott
against
Fenton,

Scarlett, *contra*, (with whom was *Tindal*,) was stopped by the Court.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court.

We think the rule for a new trial in this case should be made absolute. The case arises on an act of parliament made for the inclosure of the wastes in the manor of *Wakefield*, whereof the Duke of *Leeds* was lord,

1825.

~~Alton~~
~~Wheat~~
~~Parson.~~

lord; and wherein there were very valuable coal-mines and minerals belonging to the lord, which he was in the habit of getting, and carrying away over the wastes. These minerals, with this privilege, were probably of a value much beyond, not only the lord's interest in the surface of the wastes, but even the whole surface thereof, and therefore it is not to be supposed that he would enter into any compact for the inclosure of the wastes, wherein his right to work and carry away his minerals should not be fully reserved. The nature and situation of the wastes and minerals; and the clauses providing that all the owners of allotments shall contribute to make good the damage done to any one; and the expression, "at his free will and pleasure," which occurs in the clause reserving his privilege of making ways, &c. lead strongly to an inference that the lord's right was paramount to the rights of the commoners. But even if the lord's right in this respect were limited, as in the case of *approvement*, to the leaving a sufficiency of pasture, still the lord would not have been subject to any action at the suit of a commoner for making a road in any direction, and by any method, whether by digging of the soil or otherwise, that he might think fit to adopt, provided a sufficiency of common were left. All question of sufficiency of common is now determined by the inclosure. But if, before the inclosure, the particular direction in which a road might be made, or the quantum of soil dug in any part of the waste for the making it, did not furnish the criterion by which the exercise of the lord's right was to be judged or determined, they will not now do so absolutely and without regard to circumstances, even upon the narrowest construction that can be put upon the act of parliament, considered

as the private agreement and compact of the parties sanctioned by the legislature. But without deciding upon these points, we are all of opinion that, upon the construction of the words, "convenient *and* necessary," which occur in one part of the section, and the words, "necessary *or* convenient;" which occur in another part, the true question is not whether the road has been made in the direction, or in the manner least injurious to the owner of an allotment; or in that direction, or by that mode which a strict and rigid necessity would point out; much less whether it has been made in that direction or by that mode, which, upon a view of the work when accomplished, and when a better judgment may possibly be formed than could have been formed before, may be thought by persons possessing the highest degree of skill and experience to be the best that could have been devised; but whether the direction chosen has been such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted has been such as a prudent and rational person would have adopted if he had been making the road over his own land, and not over the land of another? This view of the subject will, on the one hand, exclude all wanton, capricious, and causeless injury to the owners of the allotments; and, on the other hand, will admit of an exercise of the right reserved by the statute in such a manner as may make the right beneficial to the lord. Whereas it must be obvious that, if the adjoining soil may not, under any circumstances, be dug to procure materials for raising elevated ramparts in hollows and valleys, or if eminences may not be cut through; but a level, or the requisite inclination, must only be made by erecting pillars or arches, or procuring materials

1823.

—
 And
 again
 Fenton.

1823.

Asson
against
Fenton.

materials from a considerable distance, and at a considerable expense, the reservation of the right will, in many instances, become futile and unavailing, by reason of the cost required for the exercise of it. This is not exactly the view of the subject that was taken at the trial, and, therefore, we think there should be a new trial, and that the costs should abide the event.

Rule absolute.

1823.

HOLLIS *against* GOLDFINCH and Others.Saturday,
February 1st.

TRESPASS for breaking and entering plaintiff's close, in the parish of *Compton*, in the county of *Southampton*, bounded on the east by a ditch, and on the west by the river *Itchin*; and cutting down the plaintiff's trees and bushes, and the materials thereof coming, taking, and carrying away, &c. Plea, not guilty. The cause was tried before *Park J.*, at the last *Spring* assizes for the county of *Southampton*, and the question between the parties was, whether the right of soil in a bank on one side of that part of the river *Itchin*, called *The New Cut*, the towing-path being on the other side, was in

By an act of the 16 and 17 *Car. 2.* certain persons were authorised to make navigable the river *Itchin*, and certain other rivers, and to cut, dig, and make new channels, and to deepen or widen the rivers, channels, &c., and to do all that might be fit for navigation, and to build locks, &c. upon any of the

lands adjoining the rivers, &c., and to make towing-paths; and it was expressly provided that the undertakers of the navigation should not make any trench, river, or watercourse, or use the locks, &c. upon the land of any person until a full agreement with, and satisfaction to the owners of the land had been made by the commissioners appointed by the act, or by the persons authorised to make the navigation, nor until satisfaction should be paid to the respective owners of the lands, according to the determination of the commissioners, or by agreement by the undertakers of the navigation. By a subsequent clause, the commissioners were to determine what satisfaction any person should have in respect of any prejudice, loss, or damage sustained for such proportion of his lands next adjoining to the navigation as should be made use of for the purposes of the act, in case the undertakers of the navigation should not have agreed beforehand, and satisfied the party so damaged. The proprietor of the navigation having brought trespass against the owner of the adjoining land, for cutting trees upon the bank of a channel made under this act, the learned Judge at the trial admitted evidence of acts of ownership exercised by the proprietors of the navigation upon other parts of the banks where the adjoining land did not belong to the defendant, and afterwards left the question to the jury, upon conflicting acts of ownership which were given in evidence; but stated, in the course of his address, that it might be assumed from the length of time that had elapsed since the passing of the act, and from the provision that no land of any person was to be used until satisfaction was made to the owner, that some agreement had been made, by which all the land used for the purposes of the navigation by the proprietors thereof had been sold to them by the land-owners. A rule having been obtained for a new trial, the Court

Held, first, that by virtue of the provisions of this act of the 16 and 17 *Car. 2.*, the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to and formed out of the earth excavated from a new channel, made for the first time under the act, as would enable them to maintain trespass.

Secondly, that as the purchase of the soil was not necessary for any of the purposes of the act, it was to be inferred that no such purchase had actually been made; and that the improbability of any such purchase ought to have been presented to the jury.

Thirdly, that acts of ownership by the proprietor of the navigation upon different parts of the bank contiguous to new channels of the navigation made under the act of parliament were not admissible in evidence to shew that the soil in the bank in question belonged to the proprietor of the navigation; and the rule for a new trial was made absolute.

the

1828.

HOLLIS
against
GOLDYINCH.

the plaintiff or defendant. The bank appeared to have been formed out of the earth excavated from the channel of the navigation. Adjoining to the bank in question, and separated from it by a small ditch, called *The Counter-ditch*, was *Warner's Mead*, which belonged to the defendant. On the part of the plaintiff, an act of parliament, passed in the 16 and 17 Car. 2., was given in evidence, by which it was enacted, "that it should be lawful for Sir *Humphrey Bennett*, and certain other persons therein named, their heirs or assigns, to make navigable or passable for boats and vessels the river of *Behin*, alias *Licking*, which runneth from *Ailsford* through *Winchester*, and certain other rivers therein named, and to cut, dig, and make such and so many new channels to, from, by, or into any or either of them, or to scour, cleanse, deepen, or widen all the said rivers, channels, brooks, or watercourses, and to do all or any other acts as might be fit for navigation, or passing by water to or from all or any of the aforesaid rivers or places where it may be made passable." There then followed a clause authorising them "to build or make, upon any of the lands adjoining the said rivers, in convenient places, locks, weirs, sluices, turnpikes, pens, or dams for water, and ways, passages, and bridges, and to make cranes for wharfs, to alter ways and bridges, and to make towing-paths. And in order that the making all or any of the premises should not be in any ways prejudicial to any persons that have any lands, &c. or weirs, mills, or other profits whatsoever, made use of for the making the aforesaid premises to the aforesaid rivers, new channels, &c. it was provided, that the undertakers should not dig, cut, carry, or make any trench, river, or watercourse, or use the locks, wears, pens for water, cranes, and wharfs, or

the

the passages, ways, bridges, or foot-rails, in or upon the land of any persons, until a full agreement with and satisfaction to the respective owners or occupiers of the lands be had or made by any five of the commissioners appointed by the act, or by the persons authorised to make the navigation, nor until such recompense or satisfaction should be given or paid to the respective owners of such lands, according to the determination of the commissioners, or agreement made by the persons authorised as aforesaid, unless it be by the consent of the respective owners, or where they should refuse to appear before or submit to the determination and decrees of the commissioners, in which latter case the persons authorised by the act, their servants or workmen, by the order and approbation of the commissioners, were empowered to cut, dig, or make any river, new river, watercourse, &c., wharfs, &c. and to make, maintain, and use the said locks, weirs, sluices, made or built upon the lands of the persons so refusing, in as full a manner as if the agreement had been made with the owners by the persons so authorised, or as if the owners had submitted to the determination of the commissioners." By a subsequent clause, the justices of peace of the respective counties where any thing was to be done in pursuance of the act were made commissioners, and any five of them were authorised to examine witnesses upon oath, and when it was made appear to them how and where the river, &c. should be cleansed, cut, digged, or made navigable, or where a new cut was to be made, and where the locks, weirs, sluices, &c. must be built and set up, the commissioners were to determine what satisfaction any persons should have, for or in respect of any prejudice, loss, or damage sustained, for such proportion

1823.

HOLLIS
against
GOSWICK.

1823.

———
HOLLIS
against
GOLDFINCH.

portion of his lands, &c. in or next adjoining to the said navigation, &c. river, &c. as should be made use of for bridges, ways, or passages, or by doing any thing appointed or consented to be done by that act, in case the undertakers should not have agreed beforehand, and satisfied the parties so damnified; and the commissioners were further authorised to hear and determine all controversies, thereafter arising, between any persons touching or concerning any matter relating to the premises, or any part thereof; and their determination was to be binding on all persons: and it was enacted, that their determinations, orders, sentences, and decrees, should be set in writing, under the hands and seals of the commissioners, or any five of them, within six weeks after the first application made to them for that cause, and should be kept amongst the records of the sessions, by the *custos rotulorum* for the county wherein the determination should be made, and that transcripts thereof should be delivered to the clerks of the peace of the said counties, to be by them kept upon record, amongst the records of their sessions of the said counties, all which should be taken, construed, deemed, and adjudged good and sufficient evidence in any court of record whatever. There was then a proviso, that if the undertakers did not make the river navigable before the 1st of *November*, 1671, the commissioners might appoint others to do it. The plaintiff having first proved that no transcript of any decree of the commissioners had, after search, been found in the office of the clerk of the peace for the county of *Southampton*, tendered in evidence a paper, stated to be an award of the commissioners appointed by the act, which was proved to come out of a chest, containing

taining his title-deeds. The learned Judge was of opinion, that it was not admissible in evidence, because it did not come from the custody required in the act of parliament. The plaintiff then gave in evidence various acts of ownership exercised by him and the former proprietors of the navigation upon the spot in question, such as cutting the bushes, and using the soil of the bank for making a towing-path; he also proved similar acts of ownership exercised by himself and the former proprietors of the navigation upon other parts of the bank on the side of the new cut, but beyond *Warner's meadow*. Between the locus in quo and some parts of the bank upon which acts of ownership were proved, a part of the ancient channel of the river intervened. This latter evidence was objected to by the defendant, but the learned Judge received it, on the ground, that as the plaintiff claimed a general right over the bank of the navigation, which might be considered one entire district, the acts done by him or by the other proprietors, in any part, was evidence to explain acts done by him in other parts of the same line. The plaintiff then gave in evidence a lease, bearing date the 8th September, 1750, by which *Edward Pyott*, the former proprietor of the navigation, demised to *R. Goldfinch* and others, for 21 years, such a competent quantity of water, flowing in the river *Itchin*, that lay above a meadow called *Compton Mawn* (a), as should be sufficient, in a proper manner, to water all or any part of the pasture ground, so as it should be taken at a proper time, and in such a convenient quantity, as not to impede the navigation, together with four hatches or sluices, then standing upon the bank of the river, for the more convenient conveying of water from the river

1823.

 HOLLIS
 against
 GOLDFINCH.

(a) *Compton Mawn* and *Warner's meadow* adjoined each other.

1823.

HOLLIS
against
GOLDING.

to the pasture ground. The lease reserved a power to the lessor to shut down, draw up, and regulate the hatches, when he deemed it convenient, for all the purposes of the navigation, or for amending or repairing the river, or any of the banks, &c. The lease contained covenants by the lessees to pay a yearly rent of 5*l.*, and to repair the hatches or sluices, so as to keep the water in the river, and to preserve the navigation from being damaged, (the lessor keeping the gates of *Compton Mawm* lock in good repair,) during the term, and to permit the lessor and his servants, at all times, to open and shut the hatches. There then followed a covenant, that the lessees, at the end of the term should, at their own costs, remove and take away the hatches thereby granted, and amend, repair, and make good, in a substantial manner, the banks of the river where the hatches then stood. This lease expired in 1771, but the defendant paid 5*l.* a-year rent down to the year 1779. It appeared, that the plaintiff in 1803, at the request of the defendant, had granted him permission to cut bushes on the bank in question. On the part of the defendant it was proved, that the bushes growing on the bank had been cut by his order, and that about ten or twelve years ago, eight or nine ash poles, there growing, which were seventeen inches round and twenty feet high, were cut down by his orders, and carried away. The learned Judge, in the course of his address to the jury, observed, that as the act of *Car. 2.* had expressly provided, that the proprietor of the navigation should not use the land of any person, until a full agreement with and satisfaction to the owners thereof had been made, that it might fairly be presumed, considering the length of time that had elapsed, that some agreement had been made the proprietors of the navigation

tion on the one part, and the land-owners on the other, by which all the land used for the purposes of the navigation was sold to the proprietors thereof, observing at the same time, that proof of such a deed, unaccompanied with acts of ownership, could have very little weight in the case; and he stated to the jury, that it was a question of fact purely for their consideration, and that it depended upon the user of the place by one side or the other; and he left it to them to find for the plaintiff or defendant, according as they were satisfied, that the acts of user, proved on the one side or the other, were stronger. The jury having found a verdict for the plaintiff,

1828.

~~Heads~~
~~against~~
~~Parties.~~

P. Williams, in last *Easter term*, obtained a rule nisi for a new trial on two grounds. The first was, that the learned Judge had directed the jury, that they might presume that the property in soil in the bank in question had vested in the original proprietors of the navigation by private agreement; whereas the act of parliament only purported to give them an easement or right of using the soil for the purpose of the navigation; and he cited *Buckeridge v. Ingram (a)*, where, upon a similar act of parliament, the Master of the Rolls held, that the soil did not pass to the undertakers of the navigation, but a mere right arising out of the soil. The second ground was, that the learned Judge had received evidence of acts of ownership exercised upon different parts of the bank, and he distinguished this from *Stanley v. White (b)*, where it might be supposed that the whole property within the belt once belonged to the *Stanley*

(a) 2 *Ves. jun.* 652.(b) 14 *East*, 332.

1823.

—
 HOLLES
 against
 GOLDFINCH.

family, whereas it was evident in this case, that the property in the soil, if bought at all, must have been bought in separate parcels of the different proprietors of the adjoining land. In *Tyrwhitt v. Wynn* (a) it was expressly stated, that leases granted by the lord on other parts of a waste, were not admissible to prove that the soil in a particular part of the waste was in the lord, unless it was previously proved that the locus in quo formed part of one entire waste to which the leases were applicable.

Gaselee, Selwyn, E. Lawes, and Poulter, now shewed cause. The act of parliament, which gave to the proprietors the use of the land for the purposes of the navigation, must have intended to give them the property in the soil. An act passed in the reign of *Charles the Second* ought not to be scanned by rules of criticism derived from the verbose enactments of modern times. *Buckeridge v. Ingram* is an authority to shew, that the shares in the river *Avon*, created by a statute similarly worded, were real property. It is true, that the Master of the Rolls intimated an opinion, that the soil did not pass to the proprietors of the navigation, but a right arising out of the soil. But that was a mere extrajudicial opinion. Assuming, however, the soil not to vest in the proprietors of the navigation by the mere operation of the act itself, it was properly left to the jury to presume an agreement between the original undertakers of the canal and the land owner, by which the property in the bank itself was conveyed to the former. It was clearly competent to those parties to enter into such an agreement; and as the act itself ex-

(a) 2 B. & A. 554.

pressly provides, that no land should be used for the purposes of the navigation until an agreement with and satisfaction to the land owners had been made by the undertakers of the canal, and as acts of ownership were proved to have been exercised by the latter for a long period of time; it might fairly be inferred, that the land could not have been so used unless an agreement had been made, vesting the soil in the proprietors. It appeared, that the proprietors had granted a lease of hatches upon the bank in question, to the former owner of the adjoining land, and as the hatches belonged to the proprietors of the navigation, it seems to follow, that the soil in the bank upon which the hatches were placed, must have belonged to them. Secondly, the acts of ownership exercised by the proprietors of the navigation upon different parts of the bank, were admissible to shew that the property in the soil in the bank in question was vested in them. In *Stanley v. White (a)*, the plaintiff's manor was surrounded on all sides by a belt of land extending 15 feet beyond a circular hedge, within which belt, the whole of it being more or less wooded, the trees in question had been cut; and it was held, that acts of ownership exercised by the plaintiff or his ancestors on other parts of the belt, were evidence to shew that the trees which had been cut within a particular part of the belt, were the property of the plaintiffs; and Lord *Ellenborough* there said, that if lands be held all under one general title throughout one entire district, he saw no objection to receiving acts of ownership in different parts, as evidence of the same right throughout the whole. Now, in this case, the right to the soil as well in the land over which the water

1823.

HOLLES
against
GOLDSTON.

(a) 14 East, 332.

1828:


 GOLDFINCH.

flowed as in the adjoining banks, must have been acquired by the proprietors of the navigation, under the authority of the act of parliament in question. The banks of the navigation may, therefore, be considered as one entire district held under a general title by the proprietors of the navigation; and if that be so, the disputed evidence was properly received.

P. Williams (with whom was *Marrett*) contrd, was stopped by the Court.

ABERT G. J. The motion for a new trial was obtained on two grounds. The first was, that improper evidence had been received. The second, that the case was not left to the jury in the way most likely to lead them to a correct conclusion upon the subject. Upon the question as to the admissibility of the evidence received on this occasion, I have not entirely made up my mind. The facts of this case are very different from those proved in *Stanley v. White*, in which case similar evidence was received. There, the obvious presumption to be drawn from the situation of the property was, that all the land within the belt had originally belonged to one and the same person. Now here, if there has been an acquisition of right by the undertakers of this navigation, it must have been made by purchase, not of one proprietor, but of many, no one of whom could be compelled to part with any interest beyond that which the act of parliament made it compulsory on him to part with. That is a very important and material distinction between the two cases. Assuming, however, the evidence to have been admissible, and considering it as evidence of ownership only, without reference to the origin of that ownership, it leaves

leaves the question between the parties very much in doubt. The enjoyment of the grass and the herbage was clearly made out to have been in the proprietor of the land; the enjoyment of the trees and bushes principally, perhaps, in the proprietors of the navigation, though that is broken in upon, for there is evidence that the defendant cut some of the trees upon the bank. I think, however, that the point with respect to the origin of the ownership, if any such ever existed, was not so distinctly presented to the jury as it ought to have been. That origin must have been under, although not *by virtue* of the act of parliament. Now it is observable, that there is not one word in the act denoting purchase or sale, or that the soil is to become vested in the undertakers of the canal. It has been said, that acts of this kind in the reign of *Car. 2.* were drawn up more concisely than they have been in later times. That probably is true; but it certainly was as easy then, if the legislature had contemplated a purchase, to have given to the commissioners a power of assessing the price to be paid for the land taken on purchase, as to have put the words into the act, that they should have the power to say how much and what satisfaction persons should have in respect of any prejudice, loss or damage. Now, if all that the act gives authority to the undertakers to do, might be accomplished without the purchase of the soil, there is no reason to suppose that the soil would be purchased. It is quite obvious, that the purposes of the act might be accomplished without the actual purchase of the soil. For it gives no power to purchase the soil of the old rivers, and never contemplated that the undertakers of the work could purchase the soil of the channel of those rivers. It is not essential to a

1823.

HOLLS
against
GOLDFINCH.

1823.

—————
HOLLES
against
GOLDFINCH.

navigation, that the proprietors of it should be the owners either of the soil over which the water flows, or of the adjoining land. And if the vesting of the soil in the undertakers of the navigation was not necessary, what reason have we to suppose that that which was not necessary should have been done? Admitting that the parties might by private agreement do more than the act compels them to do, what reason is there to suppose that they did so? A purchase would probably be more expensive to the undertakers of the navigation, than making a mere compensation to the owner for the damage done to his land. The undertakers might, in many cases, be unwilling to become purchasers. The proprietors of the land might not choose to assent to a sale, either of the land over which the water was to flow, or of the bank adjoining to it, because, by so doing, they would shut themselves out entirely from any access to the navigable channel, and thereby deprive themselves of all the means of benefiting their own adjoining land which they might possibly at some future period derive from it. I think, therefore, that if this case had been presented to the jury with this view of the act of parliament, they would have come to a different conclusion from that which they have drawn. But it has been urged, that the lease produced at the trial was evidence to shew that the land in which the sluices were placed belonged to the lessor who was the proprietor of the navigation. The great object of the lease was to grant so much of the water as might be necessary for the irrigation of the land of the lessee, but it contains a demise also of four hatches or sluices then standing on the bank of the river, not saying on whose bank. They were standing there for the purpose of conveying off the water from the canal to the pasture grounds. It is said, that

that this demise of the hatches imports that they belong to the lessor, and that, if they do so, the bank to which those hatches are affixed must also belong to him; but that is a conclusion which by no means follows, because, if they were necessary for the purpose of maintaining the navigation of the river, by admitting or excluding the water, the undertakers had a right to place the hatches there, although they might not be the owners of the soil. It is evident that they were necessary for that purpose; for the lease provides, that the lessees should repair the hatches, so as to keep the water in the river and to preserve the navigation; and that the lessor might, during the term, as often as it was necessary for the navigation of the river, or the repairing thereof, or of the works belonging thereto, stop or shut down, or keep shut or open the said hatches. Now these provisions shew decisively to my mind, that these hatches had been placed there for the purpose of maintaining the navigation of the river, and keeping a proper quantity of water in the navigable channel. Upon the whole, I am of opinion, that there ought to be a new trial; for even if all the evidence were properly received, still the nature of the powers given by the act, and the consequences naturally arising from them, were not properly pointed out to the jury.

BAYLEY J. I am disposed to think that the evidence of the acts of ownership in other parts of this bank, under the circumstances of this case, was improperly admitted, and am satisfied the case was not presented to the jury in the way that it ought to have been. The act of parliament gives to the commissioners the power to do all acts which may be necessary for the purpose of making new channels; and provides, that satisfaction shall be made

1828.

HOLLES
against
GOLDWINCH

1823.

HOLLES
against
GOLDFINCH.

made from time to time for any injury which may arise to third persons. Now, under this power of making new channels, the commissioners would have a right not only to excavate, but to make banks in order to keep the water in the channels. They are authorised not only to use the channel, but also the adjoining land, for any purpose which may be necessary in order to effect the objects contemplated by the act of parliament, but it gives them no power to purchase that land. I think, that it ought to have been presented to the jury, that as the act gives them no express power to purchase, and there was no necessity to purchase, therefore, the probability would be, that they never had purchased. It has been suggested, that although the proprietors, when they excavated the canal, did not buy the adjoining land, yet, that by laying on the bank the earth dug out of the channel, they would have a right to whatever might be growing on that bank; but it seems to me, that that is not so. They would be excused from the trespass committed by laying the earth on the adjoining land, because for that they would have made satisfaction; they would be entitled to use the bank for all the purposes of navigation, but they would have no legal right to have the bank for the purpose of growing any thing upon it. As to the lease given in evidence, I agree in the observations made by my Lord Chief Justice. Upon the other point, I incline to think, that the plaintiff was not at liberty to go into evidence of the exercise of acts of ownership on other parts of the bank, but ought to have been confined to evidence of acts done on this particular spot. In all those cases where evidence of acts done in one spot, have been held admissible in order to shew a right in another, a reasonable probability has been previously made

made out, that the whole land had been formerly in one owner, and had been all subject to one and the same burden. This was the principle upon which the cases of *Stanley v. White*, and *Tyrwhitt v. Wynn* proceeded. I am not quite satisfied whether the evidence ought to have been received in the former case on the pleadings as they were framed, because I doubt whether the plaintiff ought not in his replication to have stated, that the trees were growing on a certain district constituting one belt, over the whole of which he claimed the same right, and that they were his soil and freehold, because that would have given the defendant to understand that the plaintiff meant to give evidence of that description. Whether that be so or not, the decided cases proceed on the ground of unity of ownership or character between the spot in question and other places, with respect to which the acts of ownership given in evidence are adduced. Now, in the present case, there was no such unity of ownership or character established, for the acts of ownership are exercised on different parts of a bank of a new cut, which, in all probability, passed through the lands of many different persons. It was not necessary, for the purposes of the navigation, that the undertakers should buy the land of any one proprietor. Some might be willing, others unwilling to sell; and it is not to be inferred, that because nineteen persons in one particular line granted their freehold up to the water's edge, that the twentieth must have done the same thing. I am of opinion, that evidence of that kind could not be received, unless unity of ownership, or a distinct unity of character, was previously established; and for that reason, if there were no other, it seems to me, that there ought to be a new trial.

1823.

—
HOLMAN
against
GOLDFINCH.

1823.

HOLLES
against
GOLDFINCH.

HOLROYD J. I am clearly of opinion, that the act of the 16 & 17 *Car. 2.* did not give the right of soil to the proprietors of the canal; it contains no clause compelling the proprietors of land to sell: any purchase, therefore, would be totally independent of the powers given by the act of parliament. The act does compel the proprietors to allow the use of the land through which the river passes, and of the land adjoining, for all purposes useful or beneficial to the navigation. There was no necessity, therefore, for the commissioners to make any compensation or satisfaction, except for such use of the land as the act empowered them to have; that being the case, the presumption arising out of the powers given by the act is against their having made any purchase. Now on the trial the act seems to have been considered as affording grounds to presume that a purchase was actually made; and, for the reasons already given, the lease of the hatches or sluices appears to me to have very little effect. With respect to the evidence of other acts done upon other parts of the bank, the present impression upon my mind is, that such evidence was not admissible, because there was no preliminary evidence to shew, that the whole line of the bank had ever been one property, belonging to one person, or held under one title, before the existence of the navigation; and upon that ground, I incline to think, that that evidence ought not to have been received.

BEST J. I am of opinion, that the statute of the 16 & 17 *Car. 2.* gives no right to the undertakers of the canal to purchase the soil; it gives a mere easement, a right to make and cut the canal and towing-paths, and such other re necessary, for the
purposes

purposes contemplated by the act. It has been said, that the powers given to the commissioners necessarily imply the right to the soil; because, as the land which is covered by water cannot be used by the former owner of the soil, it gives to the proprietor of the navigation the right of soil. In order to construe this statute, it may be proper to look at the language of other statutes made in *pari materiâ*. Now the 23 *Hen. 8. c. 5.*, by which authority is granted to the commissioners of sewers to do certain things, is an act of this description, and the language used is similar to that of the present act. Although the commissioners of sewers have authority to repair the banks of rivers, yet it is perfectly clear, that they have no property in the soil; and if they make a bank near to a river, the property in the bank is not in them, but in the owner of the soil. *Callis*, 74. And in the case of *The Duke of Newcastle v. Clarke (a)*, it was held, that they had no property in a wall or dam erected by them across a navigable river, so as to entitle them to maintain trespass. It appears to me, that these are authorities to shew, that the proprietors of this navigation have no property either in the soil over which the water flows, or in the adjoining banks. I am also of opinion, that the evidence objected to ought not to have been received. The question between the parties in this case was, to whom the right of soil in the bank belonged? Now how was that question to be decided. In the first place, by title-deeds, which must clearly relate to the locus in quo, or no inference whatever can be drawn from them. If title-deeds cannot be produced, the next best evidence is possession; but then it must be the possession of the locus in quo. In this case there was

1823.

HOLLIS
against
GOLDWINCH.

(a) 2 B. Moore, 666.

1823,
HOLLIS
against
GOSWORTHY.

no evidence of possession. The only other evidence must be acts of ownership: now acts of ownership can only prove that which would be better proved by title-deeds or possession. Acts of ownership, when submitted to, are analogous to admissions or declarations, by the party submitting to them, that the party exercising them has a right so to do, and that he is, therefore, the owner of the property upon which they are exercised. The declaration of *A.*, who is in possession of land, that *B.* is the owner of that land, is evidence in favour of *B.* and against *A.*, as to that particular portion of land; but it is no evidence that *B.* is the owner of the adjoining land, which is occupied by another person, unless, indeed, *A.* and the holders of the adjoining lands all held by one and the same title. Generally speaking, therefore, acts of ownership, submitted to by the holder of one portion of land, cannot be any evidence that the person exercising them has any right to the adjoining land. Besides, one landholder might, from good-nature or other causes, permit acts which others would refuse; or he might lose his rights by negligence. It would be extremely hard, therefore, to construe the implied acknowledgment arising from acts of ownership exercised over the land of *A.* to be received as evidence of an acknowledgment of a similar right over the land of *B.*, who has never submitted to any acts of the kind. Upon principle, therefore, I am of opinion, that this evidence ought not to have been received. In the case of *Stanley v. White* such evidence was received, upon the ground, that it was to be presumed that the whole of the property within the belt once belonged to the *Stanley* family; but there is no ground for any such presumption here. In the case of *Tyrwhitt v. Wynn* it was expressly decided, that acts of ownership exercised upon other parts
of

of the waste of the manor, were not admissible, to prove that a certain portion of common land was the soil and freehold of the lord of the manor, unless it was first established that the locus in quo was part of one entire district, honor, or manor, to which those acts were applied. Upon principle, therefore, as well as upon authority, I am of opinion, that this evidence ought not to have been received.

1823.

HOLLES
against
GOSWICK.

Rule absolute.

RICKARDS *against* BENNETT and Another.

Saturday,
February 1st.

TRESPASS for taking a cheese, the property of plaintiff, at *Farringdon*, in the county of *Berks*, and converting it to the use of the defendants. There were several pleas, but the only one that proved material was as follows. That before and at the said time when, &c. the said defendant *Bennett* was and still is seised in his demesne, as of fee, of and in the manor of *Farringdon*, in the county aforesaid, with the appurtenances, whereof the said town of *Farringdon*, at the said time when, &c. and from time immemorial, hath been and still is part and parcel; and which town of *F.*, before and at the said time when, &c. was and from time immemorial has been and still is divided into two tithings or townships; and that the said defendant *Bennett*, and all those whose

Where in an action of trespass the lord of a manor set out various burthens borne by him, and then prescribed, not by reason of those burthens, but generally as lord of the manor, for a toll upon all goods bought and delivered, or bought elsewhere and brought into and delivered, in a town within the manor, which from time immemorial had been parcel of the manor : Held, after verdict, that this

was good as a claim of toll traverse, although the burthens set out did not constitute a sufficient consideration for a toll thorough.

Where a legal commencement of a prescription can be presumed, that, after verdict, is sufficient to support the claim.

estate

1823.

RICKARDS
against
BENNETT.

estate he now hath, and at the said time when, &c. had, of and in the said manor with the appurtenances, for the time being, from time whereof, &c. have repaired and maintained, and have been used and accustomed, &c. to repair, at their and his proper costs and charges, a certain market-house, a certain blind-house or lock-up house, a certain pound within the said town of *F.*, and divers, to wit, two pair of stocks within the said town of *F.*, so being part and parcel of the said manor as aforesaid, and one-half of a certain bridge called *Radcot Bridge*, and the pound and stocks within the township of *Great Coxwell*, and the pound and stocks within the township of *Little Coxwell*, when and as often as need or occasion has been or required, or shall be or require, and to provide and keep in repair, at his and their proper costs and charges, the stalls and stallages used at all and every of the markets and fairs from time to time held within the said town of *F.*, and also to provide and keep in repair, at his and their proper costs and charges, a certain brass bushel measure, for the use and benefit of all persons residing in or resorting to the said town of *F.*, so being part and parcel of the said manor as aforesaid, and having occasion to use the said bushel; and that he the said defendant *Bennett*, and all those whose estate he now hath, and at the said time when, &c. had, of and in the said manor with the appurtenances, from time whereof, &c. have had, received, and taken, and have been used and accustomed to have, receive, and take, and of right ought to have had, received, and taken, and the said defendant *Bennett* still of right ought to have, receive, and take, for every ton of hard cheese brought into the said town of *F.* for sale, and there sold and delivered within the
said

said town, or bought elsewhere than in the said town, but brought into the said town for the purpose of being delivered, and delivered within the said town, so being within and parcel of the said manor, a certain reasonable toll or duty, that is to say, the sum of 6*d.* for each and every ton of such cheese, and so in proportion for a smaller quantity than a ton, the same being payable and to be paid by the seller of such cheese, after the arrival thereof within the said town of *F.*, and where the same was ready to be delivered, but before the actual delivery thereof, to the purchaser thereof, (except in certain cases not material to be mentioned); and when and as often as the said toll or duty hath been and remained unpaid, after reasonable request and demand thereof made of the seller of the said cheese, if personally present at the delivery thereof, or if the seller should not be present, then, of the person actually delivering such cheese for and on behalf of the seller, the owner of the said manor, by himself and his servants for the time being, from time whereof, &c. have used and been accustomed to distrain, and of right ought, &c. and the said defendant *Bennett* still of right may distrain a reasonable part of the cheese so brought into the said town, for the purpose of being delivered there as aforesaid, and so delivered there as aforesaid, and to keep and detain such distress until the said toll should and shall be satisfied to them. The plea then contained a justification by the defendant *Bennett*, as lord of the manor, and the other defendant, as his servant, for seizing the cheese in question for non-payment of toll, and stated all the facts necessary to bring the case within the prescription above set out. The replication traversed the prescription, and upon that traverse issue was joined.

1823.

 RICHARDS
 against
 BENNETT.

1823,

ROCKARDS
against
BENNETT.

At the trial, before *Garrow B.*, at the last *Spring* assizes for *Berkshire*, a verdict was found for the defendant, and in *Easter* term last a rule was obtained for entering judgment for the plaintiff, non obstante veredicto, on the ground that the plea did not shew any sufficient consideration for the toll, and *Truman v. Walgham* (a) was cited. And now,

W. E. Taunton, Shepherd, and *R. B. Comyn* shewed cause. The case of *Truman v. Walgham* is very distinguishable from the present; there the toll was claimed by reason of the defendant's repairing divers streets in the town of *Gainsborough*, without alleging that the plaintiff's cart passed through those streets. No such definite reason is assigned for the present claim, which is made generally by the lord for goods brought within the manor, and delivered there, and therefore falls within the principle of *James v. Johnson*. (b) And in *Lord Pelham v. Pickersgill* (c), *Buller J.* expressly points out, as a distinction between that case and *Truman v. Walgham*, that in the latter the claim was not made, because the plaintiff had passed over the manor or land of the defendant, but because he had passed along a public street, and it did not appear that the road through that street was repaired by the defendant. There are many other cases collected in *Warrington v. Mosely* (d), which shew that the claim of toll, as disclosed by these pleadings, may be sustained. "In 8 *Edw. 3. pl. 376*, the defendants justified in trespass, for pulling down a fold, as servants to the lady of the manor of *Hastings*, who, by reason of her seignory, had a free-

(a) 2 *Wils.* 296.(b) 2 *Mod.* 143.(c) 1 *T. R.* 660.(d) 4 *Mod.* 519.

hold throughout the said vill, so that no other could fold there without her leave; this extends to strangers as well as to those of the vill, and yet it was held good.^(a) So in *Dyer* (a), where the mayor of *London* sued upon a custom to have of every alien who brought salt into the port of *London*, one-twentieth part thereof, without shewing any reason or consideration for the claim, judgment was given for the plaintiff. So, where the lord claimed to grind all corn, &c., it was held, that no consideration need be stated. (b) Now here, it is alleged, that the town of *Farringdon* has, from time immemorial, been a part of the manor of *Farringdon*, whereof the defendant *Bennett* is seised in fee, which is sufficient to ground a claim to the toll in question. In *Crispe v. Belwood* (c), the plaintiff brought trespass against the defendant, for taking 120 deal boards of the plaintiff. Defendant justified, for that Sir *W. H.* is seised in fee of the manor of *G.*, within which manor there is, and time out of mind hath been a wharf, repaired by the lord of the manor, being upon the river *Trent*; by reason of which the lord has had a toll of 2*d.* per ton of all merchandises put on land within the manor, (not saying upon the wharf,) and for non-payment to distrain a reasonable part of the goods; and that the plaintiff put on land within the manor 120 tons of deal boards, and refused to pay the toll, for which the defendant, as servant to Sir *W. H.* distrained the boards in question. Plaintiff replied *de injuriâ*, and after verdict, judgment was given for the defendant, and it was held, that landing within the manor was a sufficient consideration for the toll. [*Best J.* The argu-

1823.

~~Richardson~~
~~Richardson~~
~~Bennett~~

(a) *Dyer*, 352. b. pl. 27.(b) *F. N. B.* 123.(c) 3 *Lee*. 424.

1823.

~~_____~~
 BARNARD
 against
 BARNARD.

ment for the defendants in that case, which appears to have been adopted by the Court, is very important for the present defendants; it is thus stated. "And it may be intended, that all the lands within the manor are demesnes of the manor, for so they were at first, till the lord divided them among his tenants. And supposing that those lands are not now parcel of the demesnes, but given to the tenants in fee, yet the prescription may have a reasonable commencement, viz. that when the lord divided those lands among his tenants, he reserved this toll, for landing of goods, to himself." The case of *Smith v. Shepherd*, as reported in *Cro. Eliz.* (a) is also in favour of the defendant. But it is not necessary to maintain the propriety of that judgment, for here it is stated, that the defendant *Bennett* is lord of the manor of *Farringdon*, that the town of *Farringdon* is within the manor, and that the goods were brought into the town for the purpose of being delivered there. The present case is, therefore, undistinguishable from *Crispe v. Belwood*, which was confirmed in *Colton v. Smith*. (b) The defendant is not bound to define the nature of the toll, and to claim it either as a toll traverse or toll thorough; the plea shews that the goods were brought into the defendant *Bennett's* manor; and besides, that a variety of burthens borne by him are set out as considerations for the toll. The claim, however, is general; those considerations alone are not relied upon as the foundation of it; and therefore, although they may be considered insufficient to support the claim, yet still, if sufficient appears without them to entitle the lord of the manor

(a) 710. See *S. C.*, differently reported in *Moore*, 574. (b) *Crowp*. 47.

to a toll, the defendants are entitled to judgment, and this rule must be discharged.

1828.

~~Backman~~
against
~~Backman~~

Jervis and *G. Cross* contra. The plea should have defined the claim either as a toll traverse or a toll thorough. That, however, has not been done; and the observation made upon the plea in *Truman v. Walgham* is applicable to this case. The Court there said, "The plea is as bad as can be. The lord has artfully tried to make it doubtful, whether this be a toll traverse or a toll thorough; for he has confounded them together: the consideration he claims it for, is for mending the highway, and he would have us believe it is for passing through his own manor or land." In the present case, the claim upon the face of the plea is of a toll thorough, and therefore cannot be supported, unless a sufficient consideration is shewn. Now here the plaintiff had not the benefit of any one of the considerations stated. [*Holroyd J.* That should have been replied.] Then the case of *Truman v. Walgham* is decisive as to the insufficiency of the considerations. [*Bayley J.* There the defendant was fettered by the words "by reason whereof," introduced after the statement that divers streets were repaired by him.] It is true that those formal words are not to be found in this plea, but various considerations are stated as the ground of the claim; and if those considerations fail, the prescription is bad. [*Bayley J.* But may not all those considerations be struck out, and the claim be left as a claim generally by the lord of a manor to a toll by prescription?] In order to support such a claim, sufficient must be shewn to raise a presumption that a good consideration once existed. Now it is not stated in this

1823.

~~Remains~~
~~against~~
~~Barrett~~

plea that those under whom the defendant claims ever were seised of the demesnes of the manor of *F.*; it may be, therefore, that although lords of the manor, yet he and those whose estate he hath never were lords of the soil. [*Bayley J.* Originally, the lords of manors were lords of the soil also, but in progress of time the lands were granted out to their tenants.] The case of *Crispe v. Belwood* (a) is the only one in point for the defendant; and the effect of that is much weakened by what fell from Lord *Mansfield* in *Colten v. Smith* (b), which was another cause arising out of the same claim: he there says, "In this case, every body that pays has a benefit; for, if they go to the wharf, they have the benefit of it, and if they land their goods elsewhere within the manor, they land upon the Plaintiff's private property; and in 3 *Lev.* 424., the Court held the consideration good." It is therefore manifest that Lord *Mansfield* thought the validity of the claim depended upon the ownership of the soil. The case of *Lord Pelham v. Pickersgill* (c) is very distinguishable from the present; there the jury found, as a fact which was stated on the special verdict, that the ownership of the soil as well as of the manor was in the crown before the time of legal memory, and that they were not severed until the reign of *Car. 1.*; and in *Lord Pelham v. Haigue*, there cited, the Court of C. P. came to a different decision, the case before them being silent as to the ownership of the soil. There is another important distinction between *Lord Pelham v. Pickersgill* and this case: there it was stated upon the record, that the highway and the toll were coeval, so that it might be

(a) 3 *Lev.* 424.(b) 1 *Corp.* 47.(c) 1 *T. R.* 680.

presumed

presumed that the grant of the highway was the consideration for the toll. Here that cannot be relied upon, for nothing of the kind is stated; and according to *Truman v. Walgham*, the subject's right to pass along a highway was before all prescriptions. The case of *Lord Pelham v. Pickersgill*, so far from being an authority in favour of the present defendants, recognised and confirmed the general principle that there must be a quid pro quo in order to support a claim of toll. The same principle was acted upon in *Smith v. Shepherd* (a), *Warrington v. Moseley* (b), and *Truman v. Walgham*, and is adopted in *Com. Dig. Toll* (C), and *2 Roll. Abr. 522. Toll*, (B). Here there is nothing to shew that an equivalent for the burthen sought to be imposed was ever conferred upon the public. The plaintiff is therefore entitled to judgment, notwithstanding the verdict found for the defendant; for if the prescription is bad, the plea does not disclose any sufficient justification in law for the trespass which was committed.

1823.

RICHARDS
against
BENNETT.

ABBOTT C. J. The plea in this case alleges, not only that the manor has existed from time immemorial, but also that the town of *Farringdon* has from time immemorial been part of the manor. It is, therefore, to be presumed, that before the time of legal memory, the site of the town belonged to the lord. It is also alleged, that the toll has been paid immemorially. We may, therefore, fairly infer, that the toll was originally granted to the lord, in consideration of his consenting that the soil of the manor should be laid out in the streets of

(a) *Moore*, 574. (b) 4 *Mod.* 319. *Comb.* 395. *Holt*, 673. *S. C.*

1823.

—
 RICHARDS
 against
 BENNETT.

the town. The cases of *Crispe v. Behwood*, *Colton v. Smith*, and *Lord Pelham v. Pickersgill*, prove, that if such a consideration can be presumed, it is sufficient to support the claim made in this case. The objection which existed in *Truman v. Walgham*, and upon which that case was decided, does not apply here. There the plea set out certain considerations for the toll in such a manner as entitled the plaintiff to judgment, if those considerations were insufficient in law to support the claim. Here, although certain considerations are alleged, yet the claim of toll is general, and not by reason of those considerations. Admitting, therefore, that those would be insufficient, yet, if we can fairly infer a legal commencement of this prescription, the defendant is, at all events after verdict, entitled to our judgment.

BAYLEY J. I am of opinion, that the toll claimed is good as a toll traverse. The plea alleges certain special considerations for the claim. It appears, indeed, that the Plaintiff is a stranger to those considerations; but the defendant is entitled to succeed upon the ground of others which are not expressly set out, but may fairly be inferred. It is stated, that the plaintiff is lord of the manor of *Farringdon*, and that the town of *F.* has from time immemorial been part and parcel of the manor. The plea next states certain burthens borne by the lord, and then that the lord and those whose estates he hath, have, from time immemorial, taken the toll in question; not stating that it has been taken by reason of the considerations set out. They are mentioned as it were collaterally, and the claim is made generally by the defendant, *Bennett*, as lord of the manor, for goods brought into the

the town of *F.*, being part of the manor, and therefore, necessarily brought over a part of the manor. Inasmuch, therefore, as there was a time before legal memory when the whole soil of manors belonged to the lords of them, we may presume that this toll was granted at a time when the whole soil of the manor of *Farringdon* was vested in those under whom the defendant, *Bennett*, claims. Now judgment ought not to be entered for the plaintiff non obstante veredicto, unless the prescription as pleaded must necessarily be bad. If a legal commencement of the claim to this toll can be presumed, that is now sufficient, a verdict having been found for the defendants. This toll may fairly be presumed to have been granted at a time when the lord of the manor was also owner of the soil in return for the dedication of a part of that soil to the public. Upon this view of the case, it falls exactly within *Crispe v. Belwood*, *Pelham v. Pickersgill*, and *Colton v. Smith*. The rule must therefore be discharged.

HOLBOYD J. I am also of opinion, that the prescription as pleaded is good in point of law, the objection to it having been made after the jury have found that the prescription exists in fact. It is not a claim for toll for the privilege of going along a highway, but a claim by prescription by a lord of a manor for toll upon goods sold and brought into the manor for delivery. It is not a claim for passing through the manor, but for bringing goods into it and delivering them there. That such a prescription is good, is established by three cases, *James v. Johnson*, *Crispe v. Belwood*, and *Colton v. Smith*, and in those cases the consideration was not co-extensive with the claim. In the last two,

the

1823.

Prescription
against
BENNETT.

1823.

—
 RICHARDS
 v. BENNETT.

the consideration was repairing a wharf within a manor, and the claim was of toll upon all goods landed upon the wharf or elsewhere within the manor. In the cases where a claim of toll for going along a highway was held bad, no sufficient consideration was stated for abridging the subject's right of passing free along a highway. It was therefore necessary, in order to establish the claim in those cases, to shew that the highway did not exist before the toll. In the case of the *Mayor of Nottingham v. Lambert (a)*, a prescription to take toll for passing on an ancient navigable river through the plaintiff's manor, was held bad; but *Willes C. J.*, in delivering the judgment of the Court, distinguishes that case from those which are relied upon as in point with the present. It seems to me, therefore, that in this case a sufficient consideration is implied. It does not appear by the record whether the goods were brought along a highway or not; that is not stated in the plea, and it should have been replied by the plaintiff, if he intended thereby to shew that the toll claimed was a toll thorough, according to the case of *James v. Johnson*.

BEST J. The distinction between the two descriptions of toll is well given in a note to *Fitzherbert's Natura Brevium*, 227. "Toll thorough is in the highway, but toll traverse is for passing over another's ground." In the latter case, the use of the soil is a sufficient consideration for the toll, and it is not necessary to state any other in support of a claim to it. But in the former, it is in a highway; that is, where the proprietor had a right of passage before the grant of toll; and, therefore, the

(a) *Willes*, 111.

claimant

claimant must shew that something is done by him beneficial to the person against whom he makes the claim. This distinction is also taken by Lord C. J. *Willes* in the case of the *Mayor of Nottingham v. Lambert*. It does not appear in this case, that the plaintiff could derive any benefit from any one of the things which the defendant states he is bound to do, therefore, this toll cannot be supported as a toll thorough. In *Colton v. Smith*, the consideration stated was not sufficient to support a toll thorough; but, as it was alleged that the claimant was lord of a manor, and that the goods were landed within the manor, that was holden sufficient to support the toll as a toll traverse. So, in this case, we may reject all the considerations set out to support a toll thorough, and say, still there is enough to support the toll as a toll traverse. The plea alleges, that the cheese was brought from some other place into the defendant's manor to be there delivered. It does not state that it was carried over the defendant's lands so as to make the case exactly like that of *Lord Pelham v. Pickersgill*, but enough is shewn to raise a presumption, that at the time when the toll was granted, the land over which the cheese was carried was the defendant's land, and that is sufficient, after verdict, to establish the possibility of the legal commencement of the toll, and therefore to support the prescription. In the cases of *Lord Pelham v. Pickersgill*, *Colton v. Smith*, *Crispe v. Belwood*, and *James v. Johnson*, the land over which the road passed did not belong to the party who claimed the toll at the time of the claim. In *Crispe v. Belwood*, it was argued at the bar, and the argument was adopted by the Court, that by shewing that the party claiming the toll was lord of the manor, a presumption was raised,

1823.

 RICHARDS
 against
 BREWSTER.

1823.

RICKARDS
against
BENNETT.

raised, that, at the time when the toll was established, such party was owner of the soil, because all the soil within the ambit of the manor in ancient times belonged to the lord. This, I believe, was historically true, and, although the lord has parted with his soil over which the road passes, he may have reserved to himself the toll that was paid for the use of the road, and then the toll traverse had a legal commencement. The case of *Truman v. Walgham* has been cited, in which it is reported that the Court said, that the toll could not be supported, because it went to deprive the subject of his common right and inheritance to pass through the king's highway, which right of passage was before all prescriptions, and *Moore*, 574. is referred to, where this doctrine is certainly to be found. But in the same case, as reported in *Cro. Eliz.* 710., this appears to have been the opinion of *Popham C. J.* only, and *Gaudy* and *Clench*, justices, say in respect as it might have a lawful beginning, it is well enough without shewing it. It is not true, that public roads must have preceded all prescription. Public roads are created every day by new dedication of ways to the public use. These are either absolute or qualified dedications, as on payment of toll, or having a right to keep gates across them. In *Lord Pelham v. Pickersgill*, *Buller J.* considered the prescriptive and public right as coeval. For these reasons, I think that the plea is good, and consequently, that this rule must be discharged.

Rule discharged.

1823.

REX *against* HALL.Monday,
February 3d.

JUDGMENT in this case having been given for the defendant (ante, 123) and the master having refused to allow the defendant his costs, on the ground, that the office in question was not a corporate office, and, therefore, not within the statute of the 9 *Anne*, c. 20.,

The office of register and clerk of the court of request, which was created by statute, in the city of *Bristol*, is not an office within the meaning of the 9 *Anne*, c. 20., and therefore judgment having been given for the defendant upon a quo warranto for using that office: Held, that he was not entitled to costs.

Adam now moved that the Master should proceed to tax the defendant his costs, and he contended, that inasmuch as the office of register and clerk of the Court of Request in *Bristol* was an office in a town corporate, it was within the words of the statute. The case of *Rex v. Williams* (a) does not apply, because in that case the judgment proceeded, on the ground, that there was no charge of usurping the office of bailiff. In *Rex v. Wallis* (b) the prosecutor of a quo warranto information against a constable of *Birmingham*, was held not to be entitled to costs under the statute 9 *Anne*, c. 20., on the ground, that the statute only extended to offices in towns corporate; now in this case, *Bristol* is a city and a town corporate.

ABBOTT C. J. The statute 9 *Anne*, c. 20. is entitled "An act for rendering the proceedings upon writs of mandamus, and informations in the nature of a quo warranto, more speedy and effectual, and for the more easy trying and determining the rights of offices and

(a) 1 *Burr.* 402.(b) 5 *T. R.* 375.

1823.

The KING
against
HALL

franchises in corporations and boroughs." And the preamble recites, that divers persons had of late illegally intruded themselves into, and had taken upon themselves to execute the offices of mayors, bailiffs, portreeves, and other offices, within cities, towns corporate, boroughs and places within *Great Britain*." The act then proceeds to enact the remedies. Now it has been held, in *The King v. Wallis*, that the word *places* in this act must mean places ejusdem generis with those before mentioned, and, therefore, that *Birmingham* not being either a city or town corporate, was not a place within the act; and I am of opinion, that the terms "other offices" must mean offices ejusdem generis with those before mentioned, which are all corporate offices. Here the office of a commissioner of a court of request is not a corporate office, and that being so, the defendant is not entitled to his costs, under 9 *Ann. c. 20*.

Rule refused.

Tuesday,
February 4th.

DOE dem. of DAVID JONES and Others *against*
HUGH JONES.

By marriage settlement, certain premises were conveyed to trustees and their heirs and assigns, to the use of the father and mother of the intended husband,

for their lives and the life of the survivor; remainder to the use of the intended husband and wife, and their assigns, for their joint lives and the life of the survivor; remainder to the use of the trustees, to preserve contingent remainders during the life of the intended husband and wife, and the survivor; remainder to the use of the heirs of the husband, by his intended wife: Held, that, under this deed, the husband took an estate for life and an estate tail in remainder, and consequently that he could not, when in possession of his life estate, discontinue the estate tail, by granting a lease for lives with livery of seisin. For discontinuance can be made only by tenant in tail in possession.

peared

peared, that the lessor of the plaintiff, *Jane Jones*, was one of the two daughters and co-heirs of *Thomas Evans*, of *Ddoynant*, in the county of *Carmarthen*. By marriage settlement, made on the marriage of the latter with *Martha*, the mother of *Jane Jones*, in the year 1777, between *Evan Samuel* and *Catherine* his wife, and the said *Thomas Evans* their son, of the first part, *John David* and *Martha* his daughter, of the second part, and *William David* and *Evan Williams* of the third part, the said *Evan Samuel* and *Catherine* his wife, and the said *Thomas Evans*, granted, bargained, and sold unto the said *W. David* and *E. Williams*, in possession, and to their heirs and assigns, all the hereditaments and premises in question, by the name of *Ddoynant*, to hold to the said *William David* and *Evan Williams*, and the survivor of them, and his heirs, to the immediate use and behoof of *Evan Samuel* and *Catherine* his wife, and their heirs and assigns for their lives, and for the life of the survivor, remainder to the use of the said *Thomas Evans* and *Martha* his intended wife, and their assigns, for their joint lives, and the life of the survivor of them, remainder to use of said *William David* and *Evan Williams*, and their heirs, for the joint lives of the said *Thomas Evans* and *Martha* his intended wife, and the life of the survivor of them, upon trust, to preserve contingent remainders, remainder to the use of *William David*, his executors, &c. for 500 years, to raise the sum of 40*l.*, to be paid amongst the younger child or children of the said *Thomas Evans*, as therein mentioned, remainder to the use of the heirs of the said *T. Evans*, on the body of the said *Martha*, lawfully to be begotten, remainder to the use of *Thomas Evans*, his heirs and assigns for ever." The marriage took effect between *Thomas Evans* and

1823.

Dec. dec.
Jones
against
Jones.

1823.

DOX dem.
JONES
against
JONES.

and *Martha*, and after the death of *E. Samuel* and *Catherine* his wife, *Thomas Evans* came into possession of the premises in question, and died on the 25th *March*, 1817, leaving issue *Jane*, the wife of *David Jones*, one of the lessors of the plaintiff, and *Margaret*, who was married to the defendant, *Hugh Jones*. *Martha*, the wife of *T. Evans*, died before 1811. About the year 1802, *Thomas Evans* let the premises in question to the defendant, and the latter held and occupied the same as tenant from year to year, at a rent of 16*l*. On the 6th of *May*, 1811, whilst the defendant was so in possession of the premises, *Thomas Evans*, by deed of that date, demised the premises in question to the defendant, for three lives, at a yearly rent of 16*l*., subject to a deduction of 2*l*. 10*s*. a-year, by way of an annuity in fee to the then wife of the defendant, and livery of seisin of the premises was delivered by *Thomas Evans* to the defendant, and a memorandum thereof was indorsed upon the lease, and the rent was paid by the defendant to *Thomas Evans* during his life. The learned Judge, was of opinion, for reasons which it is unnecessary to state, that the lease was void by 32 *Hen. 8. c. 28*. It was then objected, on the part of the defendant, that an ejectment would not lie, inasmuch as the lease having been accompanied with livery of seisin, operated as a discontinuance of the estate tail, and if so, the only remedy was by formedon. The learned Judge, upon that point, directed a nonsuit, but reserved liberty to the plaintiff to move to enter a verdict. A rule nisi having been obtained for that purpose in last *Michaelmas* term.

W. E. Taunton, *Sir W. Owen*, and *R. V. Richards* now shewed cause. There was a discontinuance of the estate

estate tail, and, consequently, an ejectment is not maintainable. Discontinuance is defined by Lord *Coke* (a), to be "an alienation made or suffered by tenant in tail, or by any that is seised in auter droit, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action, and cannot enter."

Now here *Thomas Evans*, the tenant in tail, by executing the lease and giving livery of seisin, has made an alienation, so as to bar his heirs of the right of entry.

[*Bayley J.* He was only tenant in tail in remainder, and, consequently, could not work a discontinuance.]

The estate for life merged in the estate tail, and, by the union of the two, he became tenant in tail in possession.

It is true, that in *Coulson v. Coulson* (b) the Court of K. B. were of opinion, that, upon a demise similarly worded, the devisee took only an estate for life, not merged by the devise to the heirs of his body, and an estate tail in remainder. In *Hooker v. Hooker* (c), however, lands were conveyed to the use of *A.* and his wife for life; remainder to the use of *B.*, the son of *A.*, for his life; remainder to the first and other sons of *B.* in tail; remainder to his daughters in tail; remainder to *A.* in fee. *A.* and his wife having died in the lifetime of *B.*, and *B.* having died without issue, leaving a wife, Lord *Hardwicke*, with one of the judges of the Court of K. B., was of opinion, that the estate for life in *B.* was merged, by the descent of the inheritance, upon him, and the contingent remainder destroyed; and, consequently, that the wife was entitled to dower. [*Abbott C. J.* There were no trustees in that case, and therefore nothing to prevent the union of the two estates;

1823.

Doc dem.
Jorns
against
Jones.

(a) *Co. Litt.* 325. a.(b) 2 *Atk.* 246.(c) *Rep. temp. Hardw.* 13.

1823.

DOX dem.
JONES
against
JONES.

here there is a vested remainder interposed between the estate for life, and the estate tail; to liken the two cases, would be to say, that trustees to preserve contingent remainders are utterly useless.] It has been made a matter of doubt, whether such a remainder as this to trustees, to preserve contingent remainders, be not a contingent, and not a vested remainder.

... ASHOTT C. J. I am of opinion that *Thomas Evans* took only an estate tail in remainder, and not in possession, in the premises in question, and consequently that there was no discontinuance. In *Coulson v. Coulson* (a), and *Hodgson v. Ambrose* (b), there was interposed between the estate for life and the estate tail in remainder, an estate to trustees, to preserve contingent remainders; and it was held, that by reason of the intervening estate between the devise for life and the subsequent limitation to the heirs of the body, the devisee took an estate for life, not merged by the devise to the heirs of his body, and an estate tail in remainder. In *Measure v. Gra* (c), the question proposed to us upon a devise in similar words, was, whether the devisee took an estate tail in remainder, or an estate in fee in remainder? It was not contended that it was an estate tail in possession. These are authorities to shew, that in this case *Thomas Evans* had only an estate for life in possession, and an estate tail in remainder; and that being so, then the question arises, who can make a discontinuance? Now the power of *T. Evans* as to that, is precisely the same as if he had been tenant in tail in remainder, and the life estate had been in a third person, and *Peck v. Channel* (d), and

(a) 2 Str. 1125.

(b) Doug. 337.

(c) 5 B. & M. 910.

(d) Cro. Eliz. 827.

Driver

Driver v. Hussey (a), are authorities to shew that then he could not work a discontinuance, it being a general rule, that none shall make a discontinuance but he who is seized of an estate tail in possession. I am, therefore, clearly of opinion, that in this case there was no discontinuance, and that this rule should be made absolute.

1823.

Doc dem,
Jones
against
Jones

BAXLEY J. I am opinion, upon the authorities cited by my Lord Chief Justice, that *Thomas Evans* was seized of an estate for life, and an estate tail in remainder, I am also of opinion, upon the authority of *Peck v. Channel*, *Bredon's case* (b), and *Hunt v. Burn* (c), that there was no discontinuance, because he was not tenant in tail in possession.

HOLROYD J. Upon the authorities referred to, I am of opinion, that the granting of the lease for lives by *Thomas Evans* did not operate as a discontinuance of the estate tail, because he was not tenant in tail in possession. It is established by the rule laid down in *Stellley's case* (d), that where the ancestor, by any gift or conveyance, takes an estate for life, and in the same conveyance, an estate is limited either immediately or mediately to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not of purchase. Where the subsequent limitation to the heirs follows immediately the estate for life, it then becomes executed in the ancestor, forming, by its union with the estate for life, one estate of inheritance in possession; but where such limitation is mediate and another estate intervenes, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till after

(a) 1 H. Bl. 209. (b) 1 Co. 76. (c) 1 Salt. 244. (d) 1 Co. 55.

1823.

Don dem.
 Jones
 against
 Jones.

the determination of the preceding mesne estate. Now, in this case, there is interposed between the estate for life and the estate tail in remainder, an estate to trustees, to preserve contingent remainders; that being a remainder limited to persons in esse, and who are ascertained, is capable of taking effect in possession, and is therefore a vested remainder, as was decided in *Smith on the demise of Dormer v. Packhurst*. (a) The intervention of such an estate prevents the union of the estate for life with the estate tail. If, indeed, the intervening limitation between the estate for life and the estate to the heirs was contingent, even then the estate for life would not be merged, because, if it were, the intervening limitation would be thereby destroyed; but the two estates would unite, and be executed in the ancestor, only until the intervening limitation became vested by the happening of the contingency; and then they would open and become separate, in order to admit that limitation. Here the interposed estate is a vested remainder, and prevents the union of the estate for life with the estate tail, wherefore *T. Evans* had only an estate tail in remainder, and not in possession; and, consequently, he could not make a discontinuance. The rule must, therefore, be made absolute.

BEST J. concurred.

Rule absolute. (b)

Russell and *M^cMahon* were to have argued in support of the rule.

(a) 3 Atk. 135.

(b) See *Litt. s. 658*, and *Trevetian v. Lane*, Cro. El. 56., where a lease for three lives made by tenant for life and remainder-man in tail, was held to be no discontinuance.

1823.

BALDWIN and Others *against* RICHARDSON and Another.

ASSUMPSIT by the indorsee against the indorser of a promissory note. Plea, the general issue. Upon the trial before *Abbott C. J.*, at the *Guildhall* sittings after last term, it appeared in evidence that the note was indorsed by the defendants to the plaintiffs; and that it was afterwards, with the indorsement of the latter upon it, delivered by their traveller to the traveller of one *E. Waller* of *Luton*, in *Bedfordshire*, who delivered it to his master, but did not indorse it. *E. W.* paid it into the hands of the *Bedford* bankers, who transmitted it to their correspondents in *London*. The note became due on the third of *April*, and was dishonoured. *E. W.* received notice of the dishonour on the 6th of *April*, to which no objection was made; but not knowing from whom his traveller received the note, wrote to him, then at *Edinburgh*, upon the subject. The letter reached *Edinburgh* on the 10th, and the traveller immediately wrote to the plaintiffs in *London*. The plaintiffs, on the receipt of that letter on the 14th of *April*, wrote to *E. W.*, desiring him to forward the note to them, which he did; and on the 16th of *April* they sent notice of the dishonour to the defendants. Upon these facts, it was contended for the defendants that they were discharged by the laches of *E. W.*, who suffered so long a time to elapse between receiving and giving notice of the dishonour of the note. The Lord Chief Justice thought

Where the traveller of *A.*, a tradesman, received in the course of business a promissory note, which he delivered to his master without indorsing it, and the note having been returned to *A.* dishonoured, the latter not knowing the address of the next preceding indorser, wrote to his traveller, who was then absent from home, to inquire respecting it: Held, that *A.* was not guilty of laches, although several days elapsed before he received an answer and gave notice to the next party, as he had used due diligence in ascertaining his address.

1828.

BALDWIN
against
RICHARDSON.

that due diligence had been exercised, and the plaintiff had a verdict. And now,

Denison moved for a new trial, and contended that *E. W.* must, for the purposes of this case, be taken to have known the residence of the next preceding indorser: that knowledge being within his reach, inasmuch as his traveller, who received the note, would doubtless know of whom he took it. And if *E. W.* disabled himself from giving due notice to the preceding indorser, by neglecting to inform himself of his address, that is a species of negligence for which he must be equally responsible as if he had known the address but had neglected to give notice. If the contrary should be determined, it would be difficult to put any limit to the time allowed for inquiries; for, if the holder of the note might send to *Edinburgh* for information, why might he not by the same rule send to any far more distant place? The case of *Bateman v. Joseph (a)* may be distinguished from the present: there it did not appear that the plaintiff could have obtained earlier information as to the defendant's place of residence; here, *E. W.* must be considered as identified with his servant who received the note, and to have had all the information which was in the possession of the latter.

Per Curiam. If we yielded to this application, we should be laying down a new rule respecting the notice to be given of the dishonour of bills of exchange and promissory notes, which would tend to restrain the circulation of those instruments: an effect which ought

(a) 12 East, 433.

certainly

certainly to be avoided. The general rule upon this point is, that each party must give notice as soon as he reasonably can. Now had this note been received by *E. W.* in payment of a debt, from a person who did not indorse it, all that is required by the law of merchants would be satisfied by inquiring in due time of that person from whom he received it, and sending notice accordingly. The circumstance of the note having been received by the traveller of *E. W.* cannot make any substantial difference. There is not, therefore, any ground for disturbing the verdict in this case.

Rule refused.

1823.

BALDWIN
against
RICHARDSON.

JOHNSON against LINDSAY.

WIGHTMAN obtained a rule to enter an exoneretur on the bail-piece, the defendant, a bankrupt, having obtained his certificate before the rising of the Court on the day when the second scire facias was returnable.

A bankrupt having obtained his certificate before the rising of the Court on the day when the second scire facias against the bail was returnable, the Court ordered an exoneretur to be entered on the bail-piece.

Marryat shewed cause, and contended, that the bail were bound to make their application, and obtain an exoneretur, before the time for rendering the principal expired; but they did not apply until after in this instance.

Wightman, contra, relied upon the case of *Mannin v. Partridge*. (a)

(a) 14 East, 599.

1823.

JOHNSON
against
LINDSAY.

Per Curiam. That case cannot be distinguished in principle from the present. The rule must, therefore, be made absolute upon payment of costs.

Rule absolute.

Wednesday,
February 5th.

PITTAM against B. FOSTER and JOHN NORRIS,
and MARY his Wife.

Where an action was brought against *A.* and *B.*, and *C.* his wife, upon a joint promissory note, made by *A.* and *C.* before her marriage, and the promise was laid by *A.* and *C.* before her marriage, and defendants pleaded the statute of limitations, whereupon issue was joined: Held, that an acknowledgment of the note by *A.* within six years, but after the intermarriage of *B.* and *C.*, was not evidence to support the issue.

ASSUMPSIT on a promissory note made in 1814, by *Foster* and *Mary Norris*, dum sola, payable on demand, and delivered by them to the plaintiff, laying the promise to pay it by *Foster* and *Mary*, dum sola. There were also the common money counts, in which the promises were laid in the same manner. Plea, *actio non acerevit infra sex annos*: issue thereon. At the trial before *Holroyd J.*, at the last *Summer* assizes for *Northamptonshire*, it appeared in evidence, that the note was made more than six years before the action was brought, and that *Mary Norris* had been married more than six years before that time. The plaintiff relied upon an acknowledgment of the debt made by *Foster* within six years. It was objected for the defendants, that the evidence of such an acknowledgment was not admissible, the promises being laid by *Foster* and *Mary*, dum sola. *Holroyd J.* received the evidence, and left it to the jury to say, whether they believed it; and a verdict having been found for the plaintiff, he gave the defendants leave to move to enter a nonsuit. A rule was obtained accordingly in the last term; against which,

Reader

Reader and *Adams* now shewed cause. The allegation that the promise was made by *Mary Norris* dum sola, was perfectly immaterial. It can only be considered as a promise stated to have been made before a particular time; which is of no importance here, the acknowledgment by the other joint-maker of the note having taken the case out of the statute of limitations. [*Bayley J.* In an action by an executor upon promises made to the testator, evidence of a promise to the executor will not support the issue.] That case is very different. There the party might be misled in his defence, which could not happen here. [*Abbott C. J.* There is this difficulty; a promise by the wife after marriage would not be available; now she, having been married more than six years, pleads the statute of limitations.] If that be conclusive, then in all cases where a feme joint-maker of a promissory note marries, that circumstance is after six years, a complete bar to any action on the note, unless the husband acknowledges it. The case of *Whitcomb v. Whiting* (a) certainly does not entirely solve the difficulty, but it shews strongly the effect of an acknowledgment by one of several makers of a note. There the note was joint and several; and it was held, that an acknowledgment by one not sued, bound another party sued alone upon the note. Here, it is true that the husband, who is not a party to the note, will be affected by the promise; but when he married, he took his wife with all her legal liabilities. If she had remained sole, she would now have been liable to be sued: if she survives her husband, she may be rendered liable by an acknowledgment by *Foster*. There does not then appear

1823.

 PITTAM
 against
 FOSTER.

(a) 2 Doug. 652.

1823. to be any sufficient reason to say that the action shall be barred in the interim.

PITIAM
against
FOSTER.

Marriott, *contra*. It cannot be disputed, that a promise by one of several joint contractors takes a case out of the statute of limitations as to the others; but it is equally clear, that the implied promise laid against the others must be stated to have been made at a time when they were capable of making an express promise. (He was then stopped by the Court.)

ABBOTT C. J. This question depends upon the form of the promise laid in the declaration; that is not immaterial, because a promise made by the wife after marriage would not be available. Then the question is, whether an acknowledgment made within six years operates as a new substantive promise, or draws down the original promise to the time when the acknowledgment is made. In *Hurst v. Parker (a)*, Lord *Ellenborough* says, that in actions of assumpsit an acknowledgment of the debt is evidence of a fresh promise. If that be not so, but on the contrary the acknowledgment is to have the effect of drawing down the original promise, then in an action by an executor, upon promises made to the testator evidence of a promise made to the executor would support the issue. But the reverse of this proposition was decided in *Green v. Crane (b)*. That was an action of assumpsit by an executor, upon promises to the testator. Defendant pleaded non-assumpsit *infra sex annos*; and upon evidence it appeared, that after the death of the testator, and after six years from

(a) 1 B. & A. 93.

(b) 2 Ld. Raym. 1101.

the time of the contract, defendant acknowledged the debt to the executor, and promised to pay it. *Holt C. J.* delivered the resolution of the court, and said that they were all of opinion that the action could not be maintained, the promise being made to the executor, and so out of the issue. That case was followed by several others of the same kind, which it is unnecessary to mention. The last was in the Court of Common Pleas, *Ward v. Hunter (a)*: that was an action by an executrix, on promises made to the testator; plea, statute of limitations. Plaintiff relied upon defendant's having said to her that the testator always promised not to distress him for the money. The plaintiff having obtained a verdict, a motion was made to enter a nonsuit; and the court said, when the courts determined that an acknowledgment is evidence of a new promise then made, it must be of a promise made by a person competent to make it, and to a person who is in existence to receive it; and the rule for a nonsuit was made absolute. That case was determined at a time when Lord C. J. *Gibbs* presided in the Common Pleas, than whom no judge was ever more perfectly acquainted with the rules of pleading. It is not necessary to go through the other cases; those which have been already mentioned satisfy me that the statement of a promise by the wife before marriage is not an immaterial allegation. The marriage of a woman who is one of several joint makers of a note may create great difficulties in suing; but when such difficulties occur, they must arise from the fault of the holder of the note in not enforcing payment before the six years have expired.

1823.

 PITTAM
 against
 FOSTER.
(a) 6 *Tampt.* 210.

1823.

 FITZAM
 against
 FOSTER.

BAYLEY J. This was an action on a joint promise made by a man and a woman before her marriage. The plea was, that the cause of action did not accrue within six years, upon which issue was joined. The marriage of the woman took place more than six years before the action was brought, and the evidence to take the case out of the statute was of a promise by the man, made after the marriage of the feme. But the declaration being upon a promise before the marriage, the evidence did not sustain the issue. There was a case decided in *Trinity* term, 1818, *Munton v. Sculthorpe*, similar in principle to those cited by my Lord C. J. The whole of them clearly shew, that the promises relied upon in this case were not parcel of the issue, and, therefore, could not be any answer to the plea of the statute of limitations.

HOLROYD J. I am of opinion that there was no evidence to take this case out of the statute of limitations applicable to the issue upon the record. The declaration does not state a promise by all the defendants, but by *Foster* and *Mary Norris*, before her marriage. Now that would not be satisfied by evidence of a promise by *Foster* and *John Norris*, the husband, made after the marriage; and a promise by the wife after marriage would not be binding. The issue is, whether the cause of action accrued within six years; and it appeared that the wife had been married more than six years before the action was brought, so that there could not have been a promise by the wife *dum sola*, within six years, as the declaration alleged: that alone would be decisive, independent of the cases of *Green v. Crane* and *Ward v. Hunter*, which are in point.

BEST

BEST J. The case of *Ward v. Hunter* is decisive of the present question: the wife could not have made a promise within the six years; and, therefore, no one else could make a binding promise for her.

1823.

 PITTAM
against
FOSTER.

Rule absolute.

DOE dem. SADLER *against* DRING.Thursday,
February 6th.

A RULE had been obtained for quashing a certiorari which had issued to remove this cause from the inferior court of the city of *Norwich*.

A certiorari
will lie to re-
move an eject-
ment from an
inferior court.

Marryat shewed cause. The only case to shew that certiorari does not lie to remove ejectment is *Highmore v. Barlow*. (a) In cases of attachment in the mayor's court, habeas corpus may be proper; because there is a custody, either actual or implied. Here there was neither, and then the cause may be removed by certiorari. *Cross v. Smith*. (b) In *Tidd's Practice*, 399., 6th edition, it is laid down, that a writ of certiorari lies for the removal of all causes from inferior courts, whether the defendant has been proceeded against by capias or other process; but that habeas corpus does not.

Manning, contra. Unless this rule be made absolute an important alteration will be made in the practice of the court; for plaintiffs may remove causes by certiorari, and will, therefore, be enabled to remove eject-

(a) *Barnes*, 421.(b) 2 *Ld. Raym.* 836.

1823.

DOZ dem.
SADLER
against
DRING.

ments, which they cannot otherwise do. In *Gilbert on Ejectment*, 37., it is said, that hab. cor. is the only mode of removing ejectments; and *Allen v. Foreman* (a) is referred to. The case in *Barnes* appears to be the only instance of the removal of an ejectment by certiorari, and there the writ was quashed.

ABBOTT C. J. I have heard nothing to convince me that the writ of certiorari, allowed to be proper in other cases, is improper here. If the defendant shall not enable the plaintiff to go on here, that may be a ground for a procedendo.

BAYLEY J. The writ of certiorari is most beneficial for the parties. By habeas corpus nothing is removed but the cause; but a certiorari removes all the proceedings; and then the plaintiff does not lose the benefit of what was done in the court below.

Rule discharged.

(a) 1 Sid. 513.

Thursday,
February 6th.

In the Matter of ABRAHAM FLINT, Gent. One, &c.

An attorney entering a
plaint, and
suing out pro-
cess in the
county court,
during the time
of his imprison-
ment, is within
the meaning of 12 G. 2. c. 13. s. 9., and liable to be struck off the roll.

ON a former day in this term, a rule was obtained, calling upon *Abraham Flint*, one of the attorneys of this court, to shew cause why he should not be struck off the rolls, for acting as an attorney during the time

of

of his imprisonment. The acts charged against him were, entering a plaint in replevin in the county court, and issuing summonses, &c. in that cause, at a time when he was imprisoned in pursuance of the sentence of the Court of Quarter Sessions, having been convicted of an assault.

1823.

—
In the Matter
of FLINT.

W. E. Taunton (with whom was *Oldnall Russell*) shewed cause. Even supposing that the acts charged were really done by the defendant, still they do not amount to suing out process, or commencing or prosecuting a suit in a court of law or equity, within the meaning of the 12 G. 2. c. 13. s. 9. (a) That clause being highly penal, has always received a strict construction. Thus it has been held not to extend to the undertaking of a defence, the words of the act being "commence or prosecute." *Longman v. Rogers.* (b) And upon the 12th section of the act, which provides that the 9th section shall not extend to prevent an attorney from carrying on an action commenced before his imprisonment, it has been held, that he may com-

(a) By that clause it is enacted, "That from and after the 24th day of June, 1739, no attorney or solicitor who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall, during his confinement in any gaol or prison, or within the limits, &c. in his own name, or in the name of any other attorney or solicitor, sue out any writ or process, or commence or prosecute any action or suit in any courts of law or equity; and that all proceedings in such actions or suits shall be void and of none effect; and such attorney or solicitor so commencing or prosecuting any action or suit as aforesaid, shall be struck off the roll, and incapacitated from acting as an attorney or solicitor for the future; and any attorney or solicitor permitting or empowering any such attorney or solicitor as aforesaid to commence or prosecute any action or suit in his name, shall be struck off the roll, and incapacitated from acting as an attorney or solicitor for the future."

(b) *Willes*, 288. *Barnes*, 263. S. C.

mence

1823.

—
In the Matter
of FLETCHER.

mence proceedings on a bail-bond taken in an action which was begun before his imprisonment. *Whetham v. Needham*. (a) Unless, therefore, the acts which have been done clearly fall within the meaning of the statute, the Court will not hold this person liable to the heavy penalty which it imposes. In *Cross v. Kaye* (b) it was said, that the county court is only a court baron; and in *Dalton's Sheriff*, tit. *County Court*, it is called "in a manner a court baron." It is not, then, properly speaking, a court of law or equity, within the meaning of the 12 G. 2. c. 13. s. 9. (He was then about to proceed to the merits, when an arrangement was made between the parties and the rule was discharged, with the consent of the mover.)

After the rule was disposed of,

ABBOTT C. J. said, We think that the proper course has been adopted in this case; for the question raised had never received the decision of the Court, and the punishment inflicted by the act is extremely heavy. It is, however, proper to state, that we are all clearly of opinion, that suing out process, and entering a plaint in the county court, is within the meaning of the 12 G. 2. c. 13. s. 9.

(a) *Barnes*, 46.

(b) 6 T. R. 665.

1823.

HODGKINSON and Others, Assignees, against
TRAVERS.Thursday,
February 6th.

THE plaintiffs in this case were assignees, under a separate commission of bankrupt, issued on the 11th July, 1822, against one *Gregg*, and had in that character obtained a verdict against the Defendant for 157*l*. A joint commission had issued against *Gregg* and *Phene*, his partner, on the 20th August, in the same year. A petition still pending, was then presented to the Lord Chancellor for the purpose of superseding the separate commission. A rule nisi on the part of the defendants having been obtained by *Gaselee*, to pay the damages recovered into court, to abide the event of that petition.

A separate commission having issued against *A.*, and a joint commission against *A.* and *B.*; the assignees under the separate commission obtained a verdict against *C.* The Court ordered the money to be paid into court until a petition pending before the Lord Chancellor to supersede the separate commission was decided.

Scarlett, *Gurney*, and *F. Pollock* shewed cause, and contended, that the Court had no such equitable jurisdiction as that which they were called upon to exercise. But,

Per Curiam. It will be a saving of great expense to the parties, and much more beneficial to them, if we make this rule absolute, than if we send them to a court of equity. The money being recovered in an action here, we have the power to prevent execution going for it. Let the rule be made absolute for paying the money into court.

VOL. I.

S

By

1823.

HODGKINSON
against
TRAVERS.

By agreement between the parties, the rule was drawn up for investing the money in exchequer bills, and depositing them in a banker's hands, there to remain until the petition was decided.

Friday,
February 7th.

Ex parte KRANS and Others.

Where persons detained, without any warrant, on board one of his majesty's ships of war, on a charge of smuggling, and on suspicion of murder, were brought up by writs of *hab. cor.*, and it appeared by the return to those writs, and to a certiorari which issued at the same time, that the prisoners might be guilty of the offences imputed to them, the Court refused to discharge them out of custody, and committed them to the custody of the marshal; in order that they might be taken before some competent authority to be examined touching the matters contained in the returns, and to be further dealt with according to law.

ON a former day in this term, writs of habeas corpus had been obtained, directed to *W. M'Culloch*, the captain of his majesty's ship, *Severn*, commanding him to bring up the bodies of *Krans*, and 21 other persons confined on board the said ship, and at the same time a writ of certiorari was issued to the mayor of *Dover*, to remove into this Court any proceedings which had been taken before him connected with the detention of the parties. On this day 21 of the prisoners were brought up, and the following return to the writs of habeas corpus was read: "I, *W. M'Culloch*, &c. do humbly certify to this honourable Court (a), that before the issuing of the annexed writs of habeas corpus to me, that is to say, on the 13th day of *January*, 1823, the several persons mentioned in the said writs were brought on board his majesty's said ship, *Severn*, in the *Downs*, by the directions of *Henry Nager*, lieutenant in his majesty's navy, and having the command of the *Badger* revenue cutter, and left there for safe custody, until an opportunity should occur of taking them safe to *London*, to be there dealt with according to law; having been

(a) The usual form is, "To the court of our lord the king, before the king himself."

captured

captured in a smuggling cutter, after an engagement with the said cutter *Badger*, on the high seas by the said *H. Nager*, the said smuggling cutter being then and there laden with half ankers of spirits and other contraband goods: and on suspicion of the murder of *W. Cullum*, a deputed mariner of the said revenue cutter, *Badger*: whose bodies, all but one (namely, *A. V.*, who was too ill to be moved at the time of the coming of the said writs to me, and who has since died,) I have ready, as by the said writs I am commanded.

To the certiorari, two coroners' inquests were returned, one held upon the body of *W. Cullum*, and the other upon the bodies of three persons killed on board the smuggling cutter. In the former, the verdict was wilful murder against some person or persons unknown; and, in the latter, justifiable homicide. The depositions of the witnesses examined before the coroner were also returned. The several matters returned to the writs of habeas corpus and certiorari having been read,

Brougham and *Platt* contended, that they were insufficient to warrant the further detention of the prisoners. No evidence at all has been produced to connect these men with the transactions mentioned in the returns and the depositions before the coroner. The coroner's jury returned a verdict of murder against some person or persons unknown, and there is nothing at all to shew that these men were in any way implicated in the offence. Even if any of them had been identified, and the verdict had been returned against them, the coroner must have issued his warrant, and then there would have been a legal custody. [*Bayley J.* The question is, whether, if there be any thing to connect

1823.

 Ex parte
 Keane.

1823.

Ex parte
KRAVING.

these men with the offence, the Court must dismiss them, or send them before a magistrate who may investigate the charge.] The Court certainly has held upon a return to a habeas corpus, that where a warrant was defective, still if the Court were put in possession of the facts by the depositions returned, they might amend the warrant and recommit the prisoner, *Rex v. Marks (a)*; but there the individual was identified, and the only question was, whether a statutory offence had been committed. So, in *Rex v. Shebbeare (b)*, the defendant being brought up by habeas corpus, was committed to the custody of the marshal, but in that case, a warrant had been granted for the original commitment. There is no instance where the Court have interfered to the extent now proposed. Here, the parties have never been legally in custody, or even if the detention was legal at the commencement, it has become illegal by its unreasonable continuation. The parties had been detained from the 13th to the 27th of *January*, when these writs issued, without any attempt being made to take them before a magistrate for examination. If such an imprisonment is to be sanctioned, it might in like manner be protracted for two or three years. In that case the Court would surely discharge the prisoners; and here the delay, being without sufficient cause, is equally illegal.

ABBOTT C. J. My opinion in this case is founded upon the return to the habeas corpus, and upon that alone. I advert to the proceedings before the coroner, merely for the purpose of shewing that they confirm the

(a) 3 East, 157.

(b) 1 Burr. 460.

return in one important particular; viz. that *W. Cullum* has been murdered. There is nothing in the depositions to shew, that there may not exist a case in which these parties may have committed the crime. If we saw that they could not be guilty, then our decision might be different. It has been said, that this is a novel proceeding. I certainly do not recollect any instance of a writ of habeas corpus to bring up persons who were in custody for inquiry only, and if we could see that these persons are unlawfully in custody, we must discharge them. But nothing of that kind appears. It is lawful for any person to take into custody a man charged with felony, and keep him until he can be taken before a magistrate. It is contended, however, that the time during which the prisoners have been detained is unreasonable, and an extreme case is put to shew the hardship that may arise if any unnecessary detention be sanctioned. The detention without inquiry may continue so long as to induce us to think, that the original cause of it could not be valid, or worthy of any further investigation, and then we should think it our duty to discharge the prisoners. That is the only way in which a detention for an unreasonable time could affect our judgment. Here, we cannot even say that any unreasonable time has elapsed since the prisoners were taken into custody. They were captured on the high seas, and, placed for security on board one of his majesty's ships of war. Their numbers are considerable, and they were taken as smugglers. It is not at all times safe to land so many persons of such a description. In this instance too, it was thought fit that they should be brought to *London*, there to be dealt with according to law. In as much then, as we cannot say that the

1823.

 Ex parte
Kearse.

1823.
~~At the~~
 Ex parte
~~Kearney~~

time of the detention has been unreasonable, and the original cause of detainer was a lawful one, viz. the suspicion of murder, we ought not now to discharge the prisoners. It appears to me that our proper course is, not to inquire into the facts of the case, whatever may be our power, but to commit the prisoners to the custody of the marshal of the *Marshalsea*, that they may afterwards be taken before a magistrate, who may investigate the charge brought against them.

The other Judges concurring, the following rule was pronounced by the Court.

“That the prisoners be committed to the custody of the marshal of the *Marshalsea* of this Court, in order that they may respectively be taken at the first convenient opportunity before some competent authority to be examined, touching the matters contained in the return to the writs of habeas corpus and certiorari respectively, and to be further dealt with according to law.”

Friday,
 February 7th.

PICKERING *against* NOYES.

The Court will not, on the application of a defendant, in an action brought to try the title to land, compel the plaintiff or his landlord to permit the defendant to inspect or take a copy of one of the landlord's title-deeds to his estate.

E. *LAWES* had obtained a rule, calling upon the plaintiff to shew cause why the defendant should not be at liberty to inspect and take a copy of a certain deed mentioned in the affidavits. It appeared, that this was an action for breaking and entering plaintiff's close. The plaintiff was tenant to *W. Ironmonger*, who claimed to be entitled to the locus in quo. The defendant was
 “over of *James Widmore*. The deed in question bearing date in 1736, made between

Roger

Roger Widmore and two other persons ; whereby, *Roger Widmore* conveyed certain premises to a person, through whom *Ironmonger* claimed. It was now sworn, that search had been made among Mr. *Widmore's* papers, that he had no part of the original deed in his possession, but an imperfect copy only had been found, and it was necessary for the defendant to have a correct copy before he pleaded.

1823.

 PICKERING
against
NOTES.

Adam now shewed cause, and contended, that a party could not be compelled to produce his title deeds.

E. Lawes, contra, urged that there was only one part of this deed in existence, and that the landlord of the plaintiff had it in his custody.

Per Curiam. Is there any case where a deed has been ordered to be produced, unless it has been deposited in the hands of the holder as a trustee for others only, or for others jointly with himself? We might work great injustice by granting this application. Courts have gone to the utmost length that they properly can go in cases of this sort, and we should have been extremely sorry to have felt ourselves bound by any decision to make this rule absolute. But parties are never compelled to produce their title deeds. If a subpoena duces tecum is served, the party must bring his deeds into court in obedience to the subpoena ; but, if he states that they are his title deeds, no Judge will ever compel him to produce them.

Rule discharged with costs.

1823.

*See in the Matter of Lowe & Johnson & B & Adol 412*Friday,
February 7th.

In the Matter of BOWER.

Personal knowledge of an award and rule of court, makes the party liable to an attachment for not performing the award, although he has not been personally served.

APPPLICATION for an attachment against *Ralph* and *John Bower*, for not performing award. The only question was, whether the service of the award and rule of court was sufficient. It appeared, that *Ralph Bower* having a dispute with *John Bower* as to the award, had personally served *John* with the award and rule of court in the regular form. Subsequently, other parties made a demand on *Ralph* and *John* to perform another part of the same award, but there was no second personal service of the award and rule. After hearing *Campbell* in support of the rule, and *Scarlett* and *Chitty* contra, the Court held, that as personal knowledge of the award and rule of court was brought home to both *Ralph* and *John*, it was sufficient, and was equivalent to a personal service on them in the ordinary form.

Rule absolute for attachment.

Ex parte PILGRIM.

Articles of clerkship were duly stamped and executed, and transmitted to agents in town, for the

ON the 26th April *John Pilgrim* was articulated to *John Crutwell*, an attorney at Bath, for the term of five years. The usual articles of clerkship were drawn up, purpose of being enrolled with the proper officer of the court. It appeared that in the agent's book there was an entry in the hand-writing of a clerk, who had left the country, of his having attended the enrolment, and paid a fee on that occasion; but there was no entry of such an enrolment in the book kept at the master's office. The Court refused to order the counterpart of the articles to be registered *nunc pro tunc*, or to order the party to be admitted an attorney,

and

and two parts duly executed by the parties, to one of which was affixed a stamp of 120*l.*, and to the other a stamp of 35*s.* A premium of 200*l.* was at the same time paid to *Crutwell*. On the 27th *May*, the original articles of clerkship, accompanied with an affidavit of the due execution, were transmitted by *Crutwell* to *Frowd* and *Rose*, his agents in town, for the purpose of being enrolled. On the 20th *September*, 1819, *Pilgrim* was assigned to *Hoans*, an attorney at *Bath*, for the remainder of the term of five years. The usual indenture of assignment was executed by the parties, and the same, together with an affidavit of the due execution thereof, was transmitted to town for enrolment, which was in due course effected at the master's office. In *November*, 1821, he went into the office of *Frowd* and *Rose*, the agents in town, for the purpose of serving the remaining half year. The clerkship expired on the 26th *April* 1822. The usual notices of his application for admission, as of *Hilary* term, were given; but, on searching for the original articles of clerkship, at the office of *Frowd* and *Rose*, they were not to be found. In a day-book, however, belonging to them, there was the following entry of the 5th *June*, 1817: "*Pilgrim* to *Crutwell*, attending enrolled articles;" and in a rough cash-book, in the same office, which contained an account of the several sums disbursed by the clerks for office business, was the following memorandum: "5th *June*, 1817, *Pilgrim* to *Crutwell*, enrolling articles, 5*s.*" Both these memorandums were made by *John Henth*, their then clerk, but who was now at the *Cape of Good Hope*. It appeared that, at the Master's office, there was a book, in which all articles left for enrolment were entered, but there was no entry of the enrolment of the articles in question,

1823.

 Ex parte
Pilgrim.

1823.

—
Ex parte
Pilgrim.

question, though there was an entry of the assignment in 1822, nor was there any such entry in the warrant of Attorney's office for the Court of Common Pleas, or in the petty-bag office for the Rolls Court of Chancery, or the enrolment office of the Court of Chancery. Upon these facts, verified by affidavit,

Gaselee now moved that the Master might be directed to enrol the counterpart of the articles, nunc pro tunc, or that *Pilgrim* might be admitted, and he cited *Ex parte Clarke. (a)* The Court might presume the original entry of enrolment to be lost.

Per Curiam. The 34 G. 3. c. 14. s. 2., enacts, "that no person shall be admitted an attorney, unless the indenture shall be enrolled or registered with the proper officer of the court, together with an affidavit of the time of execution of such contract by the clerk; and in case the same shall not be enrolled or registered within six months after the execution thereof, together with the affidavit of the time of the execution of such contract, then the service of such clerk shall be deemed to commence from the time of such enrolment or registry only, and not from the execution of the indenture." Now here the articles have not been enrolled, and, consequently, there has not been any valid service under the indentures. If we were now to order the counterpart to be enrolled, the service could only be deemed to commence from the *time* of the enrolment.

Rule refused.

(a) 3 B. & A.

1823.

Ex parte JOHN NOHRO.

Monday,
February 10th.

A RULE nisi having been obtained for a certiorari, to remove an order made at the last general quarter sessions held for the county of *Essex*,

On moving for a rule nisi for a certiorari, it is irregular to entitle the affidavits in any cause; and if they are entitled, they cannot be read.

Brodrick, on shewing cause, objected, that the affidavit upon which the rule was obtained, was entitled, *The King v. Justices of Essex*, whereas, on the motion for a rule nisi, the affidavits ought not to have been entitled at all, as no cause was then pending before the Court.

The Court, after referring to the officers of the crown-office, said, that the affidavit was irregular, and

Discharged the rule.

RUSHWORTH, Gent. *against* WILSON.Monday,
February 10th.

THIS was an action for a libel. Plea, general issue.

The plaintiff withdrew his record, and the defendant became entitled to his costs of the day. The Master allowed the expense of bringing up witnesses from the country, who were to speak generally to the character of the Plaintiff.

Where there is reasonable ground for supposing that the evidence of a witness will be admissible, the master may allow his expenses on taxation of costs against the other party.

Brodrick moved that the Master might be directed to review his taxation; for as it was decided in *Jones v.*

Stevens

1823.

RUSHWORTH
against
WILSON.

Stevens (a) that such evidence is inadmissible, the witnesses ought not to have been brought up.

Per Curiam. If there were reasonable grounds for supposing that the evidence of the witnesses in question would be admissible, the Master might fairly exercise his discretion in allowing their expenses against the plaintiff. There certainly was sufficient doubt in this case to make the allowance of those costs proper.

Rule refused.

(a) Determined in the Exchequer, *Easter* or *Trinity*, 1822, not yet reported.

Monday,
February 10th.

WARD against LEVI.

If a defendant brings a writ of error, and puts in sham bail, the plaintiff may treat them as a nullity, and issue execution.

THIS was an action of assumpsit, tried before *Abbott* C. J., at the *Guildhall* sittings after last term, when a verdict was found for the plaintiff. On the 27th of *January* a writ of error was allowed, and on the 29th the Plaintiff's attorney was served with a copy of the rule for the allowance. On the same day the costs were taxed, and final judgment was signed for 136*l.* 10*s.* On the 31st of *January* notice of bail in error was given. On the 4th of *February* a writ of *fi. fa.* issued, under which the debt and costs were levied. A rule was afterwards obtained to set aside the *fi. fa.*, and execution for irregularity; but no error was suggested. And now,

Platt shewed cause, upon an affidavit, stating, that the persons put in as bail in error were in a very low situation

Brown v. Brown
4. B. 30

situation of life, and in the habit of becoming bail at *Serjeants' Inn* for hire. The case of *Crum v. Kitchen* (a), determined by this Court, in *Hilary* term, 1 G. 4. is precisely in point. All the circumstances of that case were similar to those now sworn to, and the Court held, that the Plaintiff was justified in treating the bail as a nullity; and the rule which had been obtained to set aside the execution was discharged with costs.

1823.

 Ward
against
Levi.

Gurney, contra. The plaintiff had a regular notice of the bail in error, and might have excepted to them, if he thought fit: as he neglected to do that, he cannot be entitled to treat the bail as a nullity.

Per Curiam. We think that the case of *Crum v. Kitchen* was very properly decided. The Court would be glad to stop entirely the practice of putting in sham bail; and although they may may not be able to effect that on mesne process, still they will take care that so improper a practice shall not be extended to writs of error.

Rule discharged with costs.

(a) In this case the costs were taxed, and final judgment was signed on the 29th of *January*, and on the same day a rule for the allowance of a writ of error was served upon the plaintiff's attorney. Notice of bail was given on the 2d of *February*. The bail put in were in the habit of attending at *Serjeants' Inn* for hire. A writ of *fi. fa.* issued on the 3d of *February*. On the 4th, a rule was obtained by *F. Pollock* to set aside the *fi. fa.*; but no error was suggested.

Scarlett and *Platt* shewed cause.

BAYLEY J. Upon mesne process the plaintiff has the security of the sheriff or the bail-bond; but in error he has no security but the bail, who are answerable, not for the person of the defendant, but for the actual payment

1823.

WARD
against
LAW.

payment of the money. No error being suggested, putting in such bail in error is a gross fraud upon the Court and its suitors; and although the rule does not ask for costs, yet to mark the sense which the Court entertains of such disgraceful practice, it should be discharged with costs.

Per Curiam. Let the rule be

Discharged with costs.

In the Matter of THOMAS JACKSON and JOHN WOOD.

An attorney engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profit instead of a salary. The names of both were painted on the office-door, and bills for business were made out and delivered in their joint names: held, that this was a case within 22 G. 2. c. 46. s. 11., inasmuch as the attorney had allowed his name to be used for and on account of an unqualified person: and the Court ordered the attorney to be struck off the roll, and the clerk to be committed to prison for a month.

A RULE had been obtained, calling upon *Jackson*, an attorney of this court, to shew cause why he should not be struck off the roll, for having acted as the agent of *John Wood*, a person not duly qualified to act as an attorney, and having permitted his name to be made use of, on account of, and for the profit of *Wood*, knowing him not to be duly qualified. The rule called upon *Wood*, to shew cause why he should not be committed to the prison of this court, pursuant to the statute of the 22 G. 2. c. 46. s. 11. It appeared, by the affidavit, that *Jackson*, who had been an attorney of this court 35 years, in 1820 engaged *Wood*, who at one time had been clerk to an attorney, but for some years had been a certificated conveyancer, to conduct his business; and had agreed to allow him a moiety of the profits of the business instead of a fixed salary. The names of *Jackson* and *Wood* were painted on the door of the office, where the business was carried on, and bills were made out in their joint names. *Wood* received instructions from the clients, and suits were instituted and carried on, in consequence of such instructions. In *July*, 1820,

Wood

Wood became an articled clerk to *Jackson*, and articles of clerkship were duly executed and enrolled. It was now sworn by *Wood*, that he never had acted as an attorney, or represented himself as such, and by *Jackson*, that he never represented *Wood* to be an attorney, or authorised him to act as such.

1823.

In the Matter
of *Jackson*.

Gaselee now contended, that, inasmuch as it appeared that *Jackson* had not done any thing whereby *Wood* was enabled to appear, act, or practise as an attorney, this was not a case within the statute 22 G. 2. c. 46. s. 11.

ABBOTT C. J. I am clearly of opinion, that this is a case both within the spirit and the words of the statute. The enacting part must be construed with reference to the mischief recited in the preamble. That mischief was, that persons not admitted as attornies, did, by the connivance of attornies, intrude themselves into, and act and practise in the office and business of attorneys. Now here, *Wood*, who is not an admitted attorney, was enabled, by the connivance of *Jackson*, to intrude himself into, and act and practise in the office and business of an attorney. This is a case clearly, therefore, within the mischief which it was the object of the statute to remedy. The statute then proceeds to enact, "That if any sworn attorney shall act as agent for any person not duly qualified to act as an attorney, or permit his name to be in anywise made use of, for the account or profit of any unqualified person, or send any process to such unqualified person, thereby to enable him to appear, act, or practise in any respect as an attorney, the attorney so offending shall be struck off the roll, and for ever after disabled from practice." Now here, *Jackson*
permitted

1823.

In the Matter
of JACKSON.

permitted his name to be made use of, upon the account and for the profit of *Wood*. It is, therefore, a case within the words of the enacting part of the clause. It has been urged, that to bring the case within the act, it must have been done for the purpose of enabling the unqualified person to act as an attorney. I am of opinion the word *thereby* applies merely to the sending of process to the unqualified person, and not to the whole of the preceding sentence. Let the rule be made absolute for striking *Jackson* off the roll, and for committing *Wood* to the prison of this court for one month.

Rule absolute.

The KING against ROGIER and HUMPHREY.

The keeping of a common gaming-house, and for lucre and gain, unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called "Rouge et Noir," and permitting the said idle and evil-disposed persons to remain playing at the said game for divers large and excessive sums of money, is an indictable offence at common law.

Semble. That an indictment would be good merely charging the defendant with keeping a common gaming-house.

THIS was an indictment against the defendants, and charged, that they unlawfully did keep and maintain a certain common gaming-house; and in the said common gaming-house, for lucre and gain, unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come to play together, at a certain unlawful game at cards, called "Rouge et Noir;" and in the said common gaming-house, unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain playing and gaming at the said unlawful game, called "Rouge et Noir," for divers large and excessive sums of money, to the great damage and common nuisance of all the liege subjects of our lord the king. Plea, not guilty. A verdict having been found against the defendants,

Per *Holroyd J.*

Curwood

1823.

 The KING
 against
 ROGIER.

Curwood and *Platt* now moved to arrest the judgment. The keeping of a common gaming-house is not an offence at common law. It is not necessarily a nuisance, but may, like a play-house, become so, if it draw together such numbers of people as to become inconvenient to the places adjacent. In *Hawkins's Pleas of the Crown*, book 1. c. 75. s. 6. 7th edit., there is this passage: "Also it has been said, that all common stages for rope-dancers, and also all common gaming-houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons; which cannot but be very inconvenient to the neighbourhood." In *Chetwynd's* edition of *Burn's Justice* (a) and *Russell on Crimes* (b), it is laid down generally, that they are nuisances; but the passage in *Hawkins* is the authority relied upon, and that by no means speaks of it as a decided point, for his expression is, "It has been said, &c." Nor does this indictment shew that any inconvenience had accrued to the neighbourhood, by numbers of disorderly persons collected together; and, therefore, it does not come within the reason, in respect of which *Hawkins* states, that it had been said, that a gaming-house was a nuisance. At common law gaming is not any offence. In *Bell v. The Bishop of Norwich* (c), it was held, that it was not sufficient cause for a bishop to refuse to admit a presentee to a living, that he was a haunter of taverns and unlawful games. Besides, the legislature have, by different statutes, 33 H. 8. c. 9. s. 11 and 12., 12 G. 2. c. 28. s. 2 and 3., 13 G. 2. c. 19. s. 9., and 18 G. 2. c. 34. s. 1 and 2., declared certain specified games to be unlawful, and *Rouge et Noir* is not one of them; and, in several of these

(a) Vol. ii. p. 582.

(b) p. 433.

(c) *Dyer*, 254. b.

1823.

The King
against
Boone

statutes, royal palaces, during the residence of the sovereign, are exempted from the operation of the acts. Now, if gaming were an offence at common law, the legislature would not have given such a sanction to the commission of that offence, by exempting persons residing in the royal palaces from the penalties imposed by statutes. Inasmuch then as gaming is not, per se, an offence at common law, and the game of Rouge et Noir has not been declared illegal by the legislature, this indictment is bad, and the judgment must be arrested.

ABBOTT C. J. I have no doubt that the facts stated in this indictment constitute an offence at common law. *Hawkins*, in the passage which has been cited, observes, "It has been said that common gaming-houses are nuisances in the eye of the law;" and then he assigns the reason, viz. that they tend to produce certain evil consequences, which is not very different from saying, that they are nuisances if those consequences are produced. Since his time many parties have been convicted upon indictments, in which the keeping of such a house has been charged to be an offence at common law. If any confirmation of the authority of *Hawkins* were wanting, it is to be found in the enactments of the legislature. The 25 G. 2. c. 36. s. 5., after reciting, that, in order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses, enacts, "That if any two inhabitants of any parish give notice in writing to a constable, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, the constable shall go with such inhabitants to a justice of the peace, and shall, upon such inhabitants making oath that they believe the contents of the notice to be true, enter into a recognisance to prosecute

prosecute such offence, and the constable is to be allowed the expenses of the prosecution, and each of the inhabitants is to receive 10*l*." And section 8. recites, "That by reason of many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment;" and then enacts, "That any person who shall appear, act, or behave himself as master, or as the person having the care or management of any such house, shall be deemed to be the keeper thereof, and shall be liable to be prosecuted as such, although he be not the real owner." These provisions are a legislative declaration, that the keeping of a gaming-house is an indictable offence. Besides, the 9 *Ann. c. 14. s. 2.*, makes playing at any game unlawful, if more than 10*l*. shall be lost. Now in this case the indictment states, not only that the defendants kept a common gaming-house, but that they permitted persons to play there for divers large and excessive sums of money. The playing for large and excessive sums of money would of itself make any game unlawful; and if so, there can be no doubt that this is an offence at common law.

BAYLEY, HOLROYD, and BEST Js. concurred, and HOLROYD J. further added, that in his opinion it would have been sufficient, merely to have alleged, that the defendants kept a common gaming-house.

Rule refused. (a).

(a) In *Rex v. Dixon*, 10 *Mod.* 336., it was held that the keeping of a gaming-house was an offence at common law as a nuisance. In *Rex v. Mason*, *Leach's C. C.* p. 548. *Grose J.* seemed to be of opinion, that the keeping of a common gaming-house might be described generally. See also 2 *Hawk. P. C. c. 25. s. 59.*

1837

B
R
R
A
T
TTuesday,
February 11th.

Where a sea-
faring man re-
mained in this
country in
order to give
evidence in a
cause: Held,
that on taxation
of costs, the
master was jus-
tified in allow-
ing him a sub-
sistence from
the service of
the writ until
the trial.

in *Mund. v. London*
9 Berr. 495

There would also have been some danger of the
evidence being lost by the various changes

Went. v. Waterman & Co. 1837

1837

BERRY against PRATT.

IN this cause a witness had been detained in *England* for some months, in order to give evidence. The Master, on taxation of costs, allowed him a subsistence from the service of the writ until the trial. The witness was an *Englishman*, but master of a ship. He resided during the whole time in his own house, but remained in *England*, in order to give evidence: he would otherwise have been at sea, pursuing his usual avocations.

Marryat moved that the Master might be directed to review his taxation. This is very different from the case of a foreigner brought over for the purpose of giving evidence. [*Abbott C. J.* In *Sturdy v. Andrews* (a) the witness was not brought over from abroad.] No case has decided that the witness is to be allowed his expenses during the time that he is residing in his own house.

Per Curiam. Upon principle, the Master was justified in allowing the subsistence-money in question. Although the witness was an *Englishman*, yet he was a sea-faring man; and, unless detained for the purpose of giving evidence, might again have gone to sea, and then the parties might have been put to a far greater expense by the postponement of the trial, on account of his ab-

(a) 4 Taunt. 697.

1823.

*Phillips v. Gellivray 5 Bing 196. The case is reported in
Broadhead's Law 2 B. & A. 340*

Tuesday,
February 11th.

LONGDEN against BOURN.

In trespass for cutting down trees. Plea, first, not guilty; second, justifying, because the trees obstructed a highway. Replication joined issue on plea of not guilty, and denied the highway; and now assigned cutting down trees extra viam. Defendant joined issue on the special plea, and suffered judgment by default on the new assignment. The jury having found a verdict for the defendant on the issues on the special pleas, and assessed damages on the new assignment: it was held that plaintiff was entitled to full costs, except upon the issues on the special pleas, and that defendant was not entitled to costs even on those issues.

TRESPASS for cutting down trees in plaintiff's close.

Plea, first, not guilty, and several pleas, justifying cutting down the trees as a nuisance, for obstructing a highway. Replication, joining issue upon the plea of not guilty, and denying the highway, and new assignment for cutting down trees, extra viam. Defendant suffered judgment by default on the new assignment. At the trial the jury found a verdict for the defendant, on the issues joined on the special pleas, and assessed the damages on the new assignment at 100%. The associate entered a verdict for the plaintiff on the general issue. On the taxation of costs the plaintiff was allowed his full costs of the cause, except the costs on the issues joined on the special pleas, but no costs were allowed to the defendant on the issues found for him.

Phillips now moved for the Master to review his taxation, and contended, that the defendant ought to have been allowed the costs on the issues joined on the special pleas. If there had not been a new assignment, and the issues on the special pleas had been found for the defendant, he would have been entitled to his costs on those issues. Now he ought not to be placed in a worse situation, in consequence of having suffered judgment by default on the new assignment, than he would have been in if there had not been any new assignment.

Per

Per Curiam. The Master informs us, that the practice always is, to tax the costs, as has been done in this case; and there being no decision cited to the contrary, this rule must be refused.

Rule refused.

1823,

LONGDEN
against
BOURN.

The King against The Justices of OXFORDSHIRE. *Tuesday, February 11th.*

ON the 13th day of June, 1822, two justices for the county of Oxford, made an order of filiation, adjudging James Nixon to be the father of a bastard child, chargeable to the parish of Southleigh, in the said county. On the 4th of July the following notice of appeal was duly served upon one of the justices, and a similar notice was served upon the churchwardens and overseers of the parish of S. "This is to give you notice, that I, James Nixon, of, &c., do intend, at the next general quarter sessions of the peace to be holden, for the county of Oxford, to commence and prosecute an appeal against an order of filiation made by you, and the Reverend W. M., since Easter sessions last, whereby I was adjudged to be the father of a female-bastard child, born on the body of Elizabeth Ray, and chargeable to the parish of Southleigh, in the said county." The appeal came on to be heard at the then next general quarter sessions, on the 16th of July, when it was objected by the respondents, that the notice was informal, as it did not shew the cause and matter of the appeal, as required by 49 G. 3. c. 68. s. 5. (a) The justices,

Notice of appeal against an order of filiation was given in the following form: "I, J. N. of, &c., intend at the next general quarter sessions to be holden, &c., to commence and prosecute an appeal against an order of filiation, made, &c., whereby I was adjudged to be the father of a bastard-child, born on the body of E. R., and chargeable to the parish of S.:" Held, that this notice was insufficient, the cause and matter of appeal not being set out as required by 9 G. 3. c. 68. s. 5.

2 B & C 88

(a) By that section it was enacted: "That any person or persons who shall think himself, herself, or themselves aggrieved by any order made by such justices as aforesaid under the provisions of this act, and not originating

HERR

The King's

opinion

The Justice of the
Quartermen

justice, held, that the objection was fatal, and refused to hear the appeal. A rule was obtained in last term, calling upon the justices of the county of Oxford, to shew cause why a *mandamus* should not issue, commanding them to enter continuances, and hear the appeal. And now, the court being called upon to give judgment thereon, the court shewed cause: That the Statute requires that two things shall be done by an appellant; first, that he shall give notice of his intention to appeal; and, secondly, that he shall specify the cause and matter of the appeal. Here only one of these requisites has been complied with; the notice merely contains a description of the order of filiation, and not of the objections to it, upon which the appellant intended to rely. The intention of the legislature clearly was, that the respondents should know precisely what objection they were to meet; for a subsequent part of the same clause directs, that the justices at sessions shall hear and determine "the causes and matters of such appeals;" which manifestly refers to those causes and matters,

in the quarter sessions, may appeal to the next general quarter sessions of the peace to be holden for the county where such order shall be made, on giving notice to such justices by one of them, and also to the churchwardens and overseers of the poor of the parish on whose behalf such order shall have been made, or to one of them, ten clear days before such general quarter sessions of the peace at which such appeal shall be made, of his, her, or its intention of bringing such appeal, and of the cause and matter thereof, and entering into a recognizance, &c., which said justices, at their said sessions, upon proof of such notice being given, and of entering into such recognizance as aforesaid, shall, and they are hereby required to proceed in, hear, and determine the causes and matters of all such appeals, &c.

which,

which, by the former part of the section, are required to be set out in the notice.

1835.

The King
against
The Justices of
Oxfordshire.

G. R. Cross, contra. The notice given in this case did set out the cause and matter of appeal. The order made by the justices contained various matters. First, the adjudication, that *T. N.* was father of the child; secondly, that he should pay the expenses of apprehension, &c.; thirdly, a weekly sum of money for the support of the child. Now it may be admitted, that, upon this notice, the last two points could not have been discussed: yet the notice is so clear, that no unprejudiced person can misunderstand the matter to be objected to the order. If the party had intended to appeal against that part of the order which directed that he should pay a certain sum for the apprehension, &c., and his notice had been "whereby I was ordered to pay so much money for the apprehension;" that would clearly have satisfied the words of the act; and, under the notice given in this case, it would not have been competent to the appellant to object to any part of the order, except that which adjudged him to be the father of the child. [*Abbott C. J.* The notice is of an appeal against an order, adjudging *T. N.* to be the father of a child, chargeable to the parish of *S.* Could *T. N.* have contended on that appeal, that the child was not born in the parish of *S.*?] The notice includes that as a matter of appeal; it might, therefore, have been enquired into at the hearing. The Court will not put a very a strict construction upon the words of the act, for it has been laid down as a general rule, that where notice of action is required, its object is merely to inform the defendant substantially of the ground of complaint. *Jones v.*

Bird.

1889

The King
against
The Justices of
Oxfordshire.

Bird. (a). And the same principle applies here. Now it is not pretended that the respondents were misled by the informality of the notice.

ABBOTT C. J. The 49 G. 3. c. 68. s. 5. requires, that notice shall be given of the intended appeal, and of the causes and matters thereof, and then proceeds to direct that the justices shall hear and determine those causes and matters. It is, therefore, requisite that they should be set out in the notice, in order to satisfy the words of the act. The object of the legislature appears to have been, that the respondents should know precisely what objections they have to meet. Now it is admitted, that under the notice given in this case, the appellant might either have contended that he was not the father of the child, or that it was not born in the parish of S., so that he could not be compelled to pay the churchwardens of that parish for its maintenance. The respondents would, therefore, be under the necessity of coming prepared to meet two objections, when one only was relied upon by the appellant. In that view of the case, the notice would be informal, but it does not appear to me to contain any information of the cause and matter of appeal; it is merely a description of the order itself, and not of the objections which the party charged, intended to make to it. The justices were, therefore, right in refusing to hear the appeal, and this rule must be discharged.

Rule discharged.

(a) 5 B. & A. 844.

1824

DREW against FLETCHER.

Wednesday,
February 12th.

THE plaintiff had recovered a verdict for 3*l.* 10*s.* in an action for money had and received. A rule nisi had been obtained by *Reader* for entering a suggestion, that the defendant lived within the jurisdiction of the *London Court of Requests*. It appeared by the affidavits in answer to the rule, that the plaintiff's wife was the only child of one *Eli Stott*, lately deceased, who by his will had devised a real estate to persons therein named. The plaintiff, in right of his wife as heir at law, claimed this estate, on the ground that the testator was insane at the time he made his will, but could not maintain an ejectment, inasmuch as a lease granted by the testator had not expired. The defendant had been in the habit of receiving the rent of the estate during the testator's life-time, and had actually received a quarter's rent which had accrued due since his death; and this action was brought against him for the purpose of trying who was entitled to that rent, and consequently the title to the estate, was the real question at the trial.

An action for money had and received brought against the receiver of an estate to recover money received by him for rent, for the purpose of trying the title of the estate, is an action for rent within the meaning of the 39 & 40 G. 3. c. 104. s. 13. the *London Court of Requests Act*; and the plaintiff, although he recovered less than 5*l.* was held to be entitled to costs.

J. Williams shewed cause, and referred to the 39 and 40 G. 3. c. 104. s. 13., by which it is provided, "that an action may be brought for rent notwithstanding that statute, and that the plaintiff should not be prevented from recovering his costs though the verdict were for less than 5*l.*;" and he contended that this, though in form

1881

form an action for money had and received, was in substance an action brought for the rent.

Daw
against
Fletcher.
An action for money had and received.

Reader, contra, contended that the clause referred to only applied to actions between landlord and tenant.

Had the plaintiff entered into the ordinary rule to pay costs, and died between the commission day and the trial, and the plaintiff was nonsuited on the merits: Held, that the executor of the lessor was not liable to pay the costs.

Per Curiam. This is in substance an action for rent. The plaintiff could not have recovered without proving his title to the rent of the premises, in respect of which the defendant received the money. It is, therefore, within the meaning of the 13th section.

Rule discharged.

Wednesday,
February 12th.

DOE demise of PAIN against GRUNDY.

Where the lessor of the plaintiff having entered into the common rule to pay costs, died between the commission day and the trial, and the plaintiff was nonsuited on the merits: Held, that the executor of the lessor was not liable to pay the costs.

THE lessor of the plaintiff had entered into the ordinary rule to pay costs. After the commission day, but before the trial, the lessor of the plaintiff died. The cause was tried, and the plaintiff was nonsuited on the merits. *Comyn* had obtained a rule nisi to compel the executors of *Pain* to pay costs.

Reader shewed cause, and cited *Thrustout v. Bedwell*. (a)

Per Curiam. The rule entered into by the lessor of the plaintiff was merely personal, to make him liable to an attachment if he refused to pay the costs. The executor would not be liable to an action for them, and therefore, to grant this motion would be taking by a summary mode, a sum of money out of the assets which the executor could not otherwise be compelled to pay.

Rule discharged.

It is now before the Court for the purpose of shewing cause why the proceedings on the bail bond should not be set aside for irregularity.

1831

DIED

Wednesday,
February 12th.

IN this case, bail justified by consent at Chambers, but the defendant did not serve any rule for the allowance of bail, or give any notice that the bail had justified. The plaintiff, afterwards, took an assignment of the bail bond.

Where bail justified at Chambers by consent, but the defendant did not serve any rule for the allowance, or give notice that the bail had justified: Held, that the plaintiff might take an assignment of the bail-bond.

The Plaintiff, for the defendant, obtained a rule to shew cause why the proceedings on the bail bond should not be set aside for irregularity.

Walford shewed cause, and contended, that it was necessary that the defendant should have served a rule for the allowance of bail, or at least have given notice that the bail had justified.

The Court held, that a rule for the allowance of bail ought to have been served, but as the defendant had an affidavit of merits, made the rule absolute on payment of costs.

1823.

RICHLEY *against* PROONE.

Declaration in assumpsit for use and occupation. Plea, that after the cause of action accrued and before the exhibiting of the plaintiff's bill, the defendant delivered to the plaintiff certain goods, in satisfaction of the promises in the declaration, which the latter accepted in satisfaction. This plea being in every respect false, the Court permitted the plaintiff to sign judgment as for want of a plea.

DECLARATION for use and occupation. Plea, that after the making of the promises, and the accruing of the several causes of action in the declaration mentioned, and before the exhibiting of the plaintiff's bill, the defendant delivered to the plaintiff, one ton weight of *Riga* hemp, and one hundred weight of *Russia* tallow of the value of 30*l.*, in full satisfaction and discharge of the promises in the declaration mentioned; and that the plaintiff accepted the same of the defendant, in full satisfaction and discharge of the several promises and causes of action in the declaration mentioned, and of all damages, &c. and concluded to the court. A rule nisi had been obtained by *Platt* that the plaintiff might sign judgment, as for want of a plea on an affidavit, stating that the plea was in every respect false.

E. Lawes shewed cause, and contended that this was a plea in common use, and that the courts had never gone the length of saying that a party might not use a plea for the purpose of delay, provided he did not put the opposite party to the unnecessary expence of consulting counsel, by pleading pleas which require different modes of trial.

The Court, without assigning any reasons, made the rule absolute.

Rule absolute. (a)

(a) This case was heard and determined at the sittings after term in the absence of *Abbott C. J.*

In the subsequent
Case of *Manning*
v. *Richard* 2 B & A
Cont'd

1823.

EICKE *against* SOWERBY.Wednesday,
February 12th.

A RULE nisi had been obtained for setting aside the execution in this case, on the ground that it had issued after the allowance of a writ of error. It appeared by the affidavits in support of the rule, that plaintiff, an attorney, had signed judgment in an action brought by him for a bill of costs; and that, upon the taxation of costs, the defendant's attorney had stated that there was error upon the record. Upon being asked what the error was, he replied, there was a variance between the affidavit to hold to bail and the declaration, and then served the plaintiff with notice of the allowance of a writ of error. The cause had been referred to an arbitrator, and pending the reference, the defendant's attorney said, that the plaintiff would never recover the fruits of his judgment as the defendant was not in a situation to pay; that he, the defendant's attorney, had never received from the defendant a shilling on account of costs. The affidavit further stated the plaintiff's belief, that the writ of error was sued out merely for the purpose of delay.

The defendant's attorney, upon the taxation of costs, stated that there was error upon the record, viz. a variance between the affidavit to hold to bail and the declaration. He had previously told the plaintiff that he would never recover the fruits of his judgment, as the defendant was not in a situation to pay, he never having paid him any thing on account of costs: the plaintiff having been served with the allowance of a writ of error, and the defendant having disclosed no other ground of error by his affidavit, the Court refused to set aside an execution issued after the allowance of the writ of error.

Per Curiam. It is perfectly clear, that a variance between the affidavit to hold to bail and the declaration, is no ground of error. And if the defendant had any other good ground of error, he ought to have disclosed it by his affidavit. The facts stated in the affidavit of the plaintiff are sufficient to call upon the defendant to shew to the Court, that there is reasonable ground to suppose that there is error upon the record.

Rule discharged with costs.

1823.

The King
against
Wynn.

favour. The decision there turned upon the general words, "all other officers of the peace in the county of Kent." It may be conceded, that the general words in this warrant would not enable any officer to act out of his own peculiar district. But, besides those words, it contains a special direction to the constables of *Woolwich*. In the latter words there is a sufficient designation personarum, and the officers intended are distinctly pointed out; they might, therefore, execute the warrant any where within the jurisdiction of the magistrates who granted it. No case has decided that an individual constable may not be as well described by his official character as by name; and, indeed, Lord *Mansfield* appears to have been of opinion that he might; for in *Blatcher v. Kemp*, he says, "The defendant is not constable of *Shipborne*, nor *Samuel Carter*, and the general direction is to be taken to each within his district;" evidently making a distinction between the direction to the constable of *Shipborne*, and to all officers generally. In Lord *Hale's P. C.* vol. 1. c. 50. p. 582. the law is thus stated: "If a warrant be directed to the constable of *D.*, he is not bound to execute it out of the precincts of his constablewick; but if he doth it out of his constablewick, it is good; and so it was ruled in *Norfolk*, in an action of trespass;" and the same is again laid down in 2 *Hale's P. C.* c. 13. p. 110., which opinion is mentioned without disapprobation by Lord *Holt*, in the case of *Kendal and Others. (a)* In *Rex v. Chandler (b)* Lord *Holt* was plainly speaking of a warrant to all the officers of a county: he says, "Where a warrant is directed generally to all constables, &c., it shall be executed by all the constables, &c., in the county." (a) 5 Mod. 78. (b) 1 Ed. Raym. 545.

shall be taken respectively to each of them within their several districts. [Bayley J. Lord Holt immediately afterwards, adds, "For where a precept or warrant is directed to men by the name of their office, it is confined to the districts in which they are officers."] The circumstance that the other constables of *Woolwich* were absent at the time when the warrant was executed, is not of any importance to the present question; for in *Co. Lit.* 181. b., it is said, "If the sheriff, upon a *capias* directed to him, make a warrant to four or three, jointly or severally, to arrest the defendant, two of them may arrest him, because it is for the execution of justice." And the same principle is stated, as applicable to warrants generally; in *Dalton's Justice*, c. 169., and *Burn's Justice*, tit. *Arrest*. *Chetw.* edition.

1823.

The King
against
Wm.

Marryat and *Bolland*, contra, were stopped by the Court.

BAYLEY J. It is of great consequence that magistrates should be careful to direct their warrants in such a manner that the parties to be affected by them may know, that the persons bearing the warrants are authorised to execute them. The importance of giving such information will be easily admitted, when it is remembered, that according to the extent of the officer's authority, his death may be murder, manslaughter, or perhaps justifiable homicide. A magistrate has power to direct his warrant to a particular person by name, and then the latter has an authority coextensive with that of him who confers it. But a warrant may also be directed to a person, not by his name, as an individual, but by the description of his

1823.

The King
against
Wain.

official character; and such a direction may be limited to the officers of a single parish, or may extend to all the officers of a county. In the latter case it is clear, that the instrument must be construed *reddendo singula singulis*, and the authority delegated to such officer is limited to the district for which he is appointed. The present is a middle case, between a direction to an individual by name, and one to all the officers of a county. It is a special direction to the officers of *Woolwich*, by the description of their official character. The question then distinctly arises, whether under such an authority the officers of *Woolwich* were justified in executing the warrant out of that district. I am of opinion, both, upon the authorities and the reason of the thing, that, by a direction to a particular person by name, then "to the constables of *Woolwich*," then "to all officers," the magistrate gives authority to the constables of *Woolwich*, within the limits of *Woolwich*, and not beyond them. In the case of *The Village of Chorley (a)*, Lord *Holt* says, "If a warrant be directed to the constable by name, commanding him to execute it, though he is not compellable to go out of his own precinct, yet he may if he will, and shall be justified by the warrant for so doing: but if the warrant be directed to all constables, &c. generally, it shall be taken respectively, and no constable can execute the same out of his precinct." The late learned editor of the last edition of that book, in a note, cites the judgment of Lord *Holt*, in *Rex v. Chandler*, as implying, that the name of office is sufficient to authorise the constable to execute the warrant out of his district, and that it is not neces-

(a) 1 *Salk.* 176.

sary to insert the personal name of the officer, in order to give him that authority. The case cited does not appear to me to warrant the opinion advanced in that note; for Lord *Holt* uses this expression: "Where a warrant or precept is directed to men by the name of their office, it is confined to the districts in which they are officers;" which certainly implies an opinion, that the constable of a parish cannot beyond the limits of the parish execute a warrant directed to him by the description of his office. The case of *Reg v. Tooley* (a) is important; there the warrant was granted by commissioners, under the 27 *Eliz.*, who were authorised to hear, determine, and punish certain offences within the city of *Westminster*, according to the custom of *London*, and the direction of the warrant was to the constables of the parish of *St. Margaret's, Westminster*: the officer seized the party within the parish of *St. Paul's*, a rescue was attempted, and in the end an assistant of the officer was killed: after much consideration it was held, that the offence was not murder, the authority of the constable being limited to his own parish, although, by the custom of *London*, the constable of one parish may execute a warrant in another. That case applies strongly to the present. In *Blatcher v. Kemp* Lord *Mansfield* certainly observed, that the defendant was not constable of *Shipborne*; but it does not thence necessarily follow, that if he had been constable of *Shipborne*, Lord *Mansfield* would have held that he was justified in acting beyond the limits of that place. In all probability he merely intended to state, that the question did not arise as to the extent of the authority given to the constable of

1823.

The King
against
Watts.

(a) 2 *Ld. Raym.* 1296.

1823.

The King
against
Wain.

Slipborne. For these reasons I am of opinion, that when a warrant is directed to a constable by his name of office, the authority thereby given does not enable him to act beyond the limits to which his office extends. The constable of *Woolwich* was not then justified in entering the house in *Deptford*; and that being so, the ground of this prosecution fails, and the rule to enter a verdict for the defendants must be made absolute.

HOLROYD J. I am of opinion, that the constables of *Woolwich* had not, in this instance, any authority to act out of that liberty. A warrant may be directed to officers, as individuals, or to individuals who are not officers; and then they may execute it any where within the extent of the magistrate's jurisdiction. But, when a warrant is directed to persons by the description of their office, that is not a special direction, independent of their character as officers. The warrant in question was directed to one person individually, describing him also as an officer of the parish, then "to the constables of the parish," not "to *B. and C.* constables of the parish," then "to all other officers," &c. That being the form used, authority was given to the constables of *Woolwich*, because they filled that office, and not as individuals; it therefore extended no further than the district within which they were officers. The warrant might, indeed, have been for the performance of something out of the parish of *Woolwich*, viz.; if it had recited that the parties rated had property in *Deptford*, and had ordered a distress to be made upon that property; then the direction to the constables of *Woolwich* might have been considered as a special delegation of authority to them to act out of that parish, otherwise the warrant would have been nugatory as to them.

them. But this is not such a case; and, therefore, upon the principle of the distinction between a direction by the individual name, and the official character, as well as upon the authorities, I think that the constable of *Westwick* was not justified in acting out of that parish. The case of *Reg v. Toley* is decisive; that is a case of great authority, having been much considered before judgment was given. The passages cited from Lord *Hale's P. C.*, taken by themselves, may imply an opinion, that if the direction be to particular persons by their name of office, they may act beyond the limits of that office; but in *Rex v. Chandler*, one part of Lord *Hale's* judgment seems to imply the same thing; yet what he afterwards adds shews that his observation was intended to apply to those cases only where the warrant is directed to particular persons by name; and the same thing appears from what Lord *Holt* says, in the case of *The Village of Chorley*; and the passages in Lord *Hale's P. C.* may fairly be construed with the same qualification. From the case of *Blatcher v. Kemp* also an argument may *prima facie* be drawn in favour of this prosecution; but there the Court had no occasion to consider how the law would have been, had the defendant been constable of *Shipborne*; they therefore laid that out of their consideration, and gave no opinion upon the point.

BURR J. I think we are bound to take care that the law relating to the duty of constables shall rest upon broad, plain, intelligible principles, that constables may know where they are to execute warrants, and that the parties to be affected may know when they are to submit to them. Now, it is plain, that magistrates may direct their war-

1823.

The King
v. Toley
1823.
ACT 17

1828.

THE KING
v. Wm.

Warrant to officers, either by their names, or by the description of their office. If the former mode be adopted, the officer may execute the warrant any where within the ambit of the magistrate's authority; if the latter, then the plain and obvious meaning of it is, that the officer shall not act beyond the precincts of his office.

This is the principle which is to be extracted from all the cases, particularly from *Reg v. Tooley*. That case was twice argued, and much considered before judgment was given; and although the statute 27 *Elix.* gave authority to punish certain offences in the city of *Westminster*, as they might be punished by the custom of *London*, and although by that custom the constable of one parish may execute a warrant in another, yet it was held, that the 27th of *Elix.* did not extend that privilege to the city of *Westminster*; and that a warrant issued under the provisions of that act, directed to the constables of the parish of *St. Margaret's*, could not legally be executed by them in the parish of *St. Paul's*, although both were within that city. The case of *Rees v. Chandler* is to the same effect. In *Blacker v. Kemp* Lord *Mansfield* did not decide upon the distinction now taken. In order to ascertain the effect of any decision, we should look rather to the principles laid down, than to the special circumstances of the case. Now, the principle there laid down was, that the warrant must be construed reddendo singula singulis. If that principle be applied in the present instance, it appears manifestly that the magistrates intended the warrant to be executed by the officers of that place where the property to be seized was situated. The plain rule then is, that where a warrant is directed to any one by name, he may execute it any where within the jurisdiction of the magistrates;

gistrates; but where it is directed by the description of an office, then the officer cannot act beyond the precincts of his office. This rule may serve to avoid disputes as to the authority of peace officers, which frequently produce much inconvenience and mischief. For these reasons, I am of opinion, that this rule must be made absolute.

Rule absolute.

Lord HUNTINGTOWER *against* GARDINER.

SAME *against* IRELAND.

THIS was an action of debt for penalties under the 2 G. 2. c. 24. s. 7., for bribery at an election. The first count of the declaration stated the issuing of a writ for the election of two burgesses to serve in parliament for the borough of *Hechester*; and that the defendant, having a right to vote at the said election, did receive of and from one *W. S.*, a large sum of money, to wit, &c. by way of gift to him, the said defendant, for giving his vote for *S. L.* and *Sir T. C.*, two of the candidates, that they might be elected. Several other counts followed, in substance similar to the first. A second series of counts charged that the defendant, before the election took place, did agree with the said *W. S.*, to receive a sum of money, to wit, &c., by way of gift to him, the said defendant, to give his vote in that election for such candidates as the said *W. S.* should appoint. At the trial at the last Summer assizes for *Somersetshire* before

1823.
The King
against
Wynn.

Where a voter received money after an election for having voted for a particular candidate, but no agreement for any such payment was made before the election: Held, that this was not an offence within the 2 G. 2. c. 24. s. 7.

An ambiguous expression in a declaration is cured by verdict, and must afterwards be taken to have been used in that sense which would sustain the verdict.

Richardson

1823. In *Michaelmas* term, it had proved, that after the election the defendant received the sum of £50, for having voted for Lord Holland & Sir F. C. B. but no evidence whatever was given of any pre-existing agreement. It was then objected, that the evidence did not support any count in the declaration, as the charge in the first series of counts did not constitute an offence within the statute, unless the words "for giving" in these counts, were read "to give." The learned Judge reserved the point, and left the case to the jury, who found for the defendant upon the counts charging the previous agreement, and for the plaintiff upon the others. In *Michaelmas* term a rule to enter a nonsuit was obtained; against which,

Gaslee and *E. Davies* now shewed cause. The act of 2 G. 2. c. 24., upon which this action proceeds, is remedial as well as penal. The preamble is, "whereas it is found by experience, that the laws already in being have not been sufficient to prevent corrupt and illegal practices in the election of members to serve in parliament." It then proceeds, "for remedy, therefore, of so great an evil, &c." The statute then being made for the remedy of an existing evil, should receive a liberal construction, and such as is best calculated to effect the intention of the legislature. The words "to give," used in the seventh section, may therefore be construed "for having given," or the mischief will be very imperfectly remedied; for it is equally criminal to receive money for having voted as for promising to vote; and the commission of bribery will be very much facilitated if it is not necessary to show a pre-existing agreement. The very practice of giving money after an election, or may raise an expectation of similar payments in future, which

which will produce quite as much effect upon the minds of the voters as any express promise could do. But, secondly, if it be thought that the offence must be complete before the election, then this motion fails as the objection is upon the record. The words "for giving" mean, "for having given;" and if that be not within the statute, the motion should have been in arrest of judgment, so that the opinion of a court of error might be obtained. *Adm. and C. F. Williams, contra*, were stopped by the Court.

BAYLEY J. Two questions have been raised for the plaintiff in this case; 1st, Whether the 2 G. 2. c. 24. s. 7, applies where money has been paid to a voter after the election, but no pre-existing agreement can be proved; and, 2dly, Whether the motion ought not to have been in arrest of judgment, on the ground that the objection appears upon the record. In deciding the first point, it is not for us to say what might be politically desirable, but what is the provision of the legislature; and in order to answer that question, we must refer to the established rules for construing acts of this nature. In construing remedial statutes, we are not tied down to the letter of the enactment, but effect must not be given to a penal statute, unless the offence charged comes within the very words of it. Now, the legal distinction between remedial and penal statutes is this, the former give relief to parties grieved, the latter impose penalties upon offences committed. Judging it by that rule, the 2 G. 2. c. 24. is a penal act. The seventh section of it enacts, that "if any person who hath

c. 328;

1811
1812
1813
1814
1815
1816
1817
1818
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1880
1881
1882
1883
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1900

1823.

Lord Hume
introduces
the bill
Gambrell

hath or claimeth to have a vote, &c. shall ask, receive, or take any reward by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, *to give* his vote, or to refuse or forbear *to give* his vote in such election," &c. he shall be liable to a certain penalty. The offence, therefore, in the terms of the act, is receiving or agreeing to receive a reward, *to give*, or to forbear *to give* a vote; the plain meaning of which is, *in order that he may give or forbear to give his vote*. The words used are clearly prospective, not retrospective, and such an operation, it probably was the intention of the legislature to give them when the act passed. Other parts of the statute may assist us in forming a judgment as to that intention. The first section prescribes an oath to be taken by each elector, that he has not received any sum of money, &c. or any promise or security for any money, &c. *in order to give his vote*. It has been argued, that the mischief is as great if money be received for having voted, as if it be taken in pursuance of an agreement to vote. Admitting that to be so, still it is plain that the oath only applies to that which passes before the election. The legislature might very easily have introduced into that clause the words, that the voter would not receive money, &c. for having voted, had it been intended to make that an offence. There is also another clause in the act which throws some light upon this question. The eighth section enacts, that any person discovering another offender, shall be himself indemnified against all penalties incurred by offending against the act. Now, that discovery is to be made within a period of twelve months, which are to be computed from the time of the election. If then it be an offence to receive money

money after an election without any previous agreement, and that money be not paid within twelve months next after the date of the election, an offender against the act may be discovered, and yet the benefit of the eighth section will not be conferred upon the discoverer. It may, for these reasons, be well doubted that the legislature intended to extend the penalty to such a transaction as was proved in this case; and the meaning of the words of the statute is plainly prospective, that therefore, is the only operation which we are authorised to give them. As to the second question, whether this motion to enter a nonsuit be the proper one, it seems to me that the objection was properly taken at the trial, and does not arise upon the record. If the declaration had stated, that the money was received by the defendant "for having given," and not "for giving" his vote, it would have been otherwise. The expression "for giving" does not necessarily mean, "for having given," but is clearly equivocal. Now, if an ambiguous expression be used in the declaration, that is cured by verdict, and must afterwards be construed in that sense which would sustain the verdict, *Avory v. Hoole*. (a) If, then, it be no offence to receive money for having voted, but it is an offence to receive it in order to give a vote, we should be obliged to presume after verdict that the ambiguous words "for giving," were used in the latter sense; and as there was no evidence given at the trial sufficient to support such an allegation, I am of opinion that a nonsuit must be entered.

HOLROYD J. I am of opinion, that the rule for entering a nonsuit must be made absolute. It has been

(a) 2 Cowp. 625.

1823.

Lord Hums.
INCORPORATED
GARDNER.

1838

Lord Eldon
in error
affirmed
Guthrie

argued, that this must be construed as a remedial act. In one sense, all penal acts are remedial as meant to remedy an evil. But that is not the distinction between remedial and penal acts, upon which the rules of construction depend. This act is certainly extremely penal, although intended to remedy an evil; it not only imposes a heavy penalty, but for ever deprives the offender of his franchise as a voter. It is not necessary to decide, whether we could go beyond the express words of the statute if the intention of the legislature had been, that the clause should have a retrospective operation; for no such intention appears. The words used are evidently prospective; they must be construed as if they had been "in order to give," or "in order to forbear to give;" and the section provides not only for receiving a reward, but for making an agreement for the receipt of money, although it be not paid until after the election. But the words do not go beyond that; we cannot, therefore, infer that a voluntary payment after the election comes within the meaning of the statute. This view of the subject is confirmed by the argument drawn by my Brother *Bayley* from the first and eighth clauses. The next question is, whether this objection could properly be taken at the trial, if it could not, but constitutes an objection upon the record, the motion in its present form ought not to succeed. If the words in the declaration had been clearly retrospective, the question would have arisen upon the record; but the words "for giving" a vote, are in common parlance prospective, and in the third section of this very statute, the words "for making," are used in a prospective sense. That section prescribes an oath to be taken by the returning officer before the election, that he has not received

received any money, &c. "for making" any return at the present election. The declaration might have been bad upon demurrer, but the expression used, is ambiguous, and there is no demurrer, and the term used is such as may be within the act. The issue then is joined as to facts so stated, as in one sense of the words, to make an offence within the act. After verdict, therefore, such an offence must be taken to have been proved, and consequently this is not an objection which can be determined by referring to the record. The case of *Avery v. Hood* is directly in point. Here then, the evidence not having proved any offence within the act, a nonsuit must now be entered.

1838

Lord Brougham
in open court
against
GARDNER.

BEST, J. I cannot but feel strongly the mischief arising from bribery at elections, and should therefore be willing to go as far as possible in order to suppress it. We must, however, take care that we do not with that view transgress the law. I am clearly of opinion, that this is not a case within the 2 G. 2. c. 24. The previous agreement has been negatived by the jury. Now, can we say that a man receiving money after voting, but not in pursuance of any corrupt preceding agreement, has committed an offence against the statute in question? All the terms of the act shew that it applies to those cases only where an agreement has been entered into before the election. It would be wasting time to go through the arguments used by my Brothers; I agree in them all, particularly in those drawn from the other clauses to which reference has been made. It has been urged that this is a remedial act; it is so, but we are not acting upon the remedial part of it. A committee of the House of Commons might, perhaps, acting upon the

1823.

LORD HURST-
INGWORTH
against
GARDNER.

the remedial part, give relief to the candidate grieved, and enable him to take his seat. But there the remedial part of the act ends. We are called upon to give effect to a penal clause, and must therefore construe it strictly, for we ought not to pronounce a judgment imposing very severe penalties, unless the offence comes within the letter of the act, whatever might have been the intention of the legislature in passing it. I do not, indeed, think that what was done by this defendant is within the spirit of the act; from the finding of the jury, we are bound to presume that he gave his vote honestly, and was afterwards seduced into receiving a reward for having done so. For these reasons, I agree with the rest of the Court, that a nonsuit must be entered.

Rule absolute.

JACKSON *against* PEARSON and SQUIRREL.

By 9 G. 1.
c. 22. s. 7. the
inhabitants of
the hundred are
to make satisfaction
for damages occasioned
by the acts therein
mentioned:
Held, that
under this
statute, the action
must be
against all the
inhabitants of
the hundred;
and the declaration
being against two only, it was held bad on motion in arrest of judgment.

DECLARATION against the defendants, two of the inhabitants of *Gogford* in the county of *Sussex*, stated that some persons, to the plaintiff unknown, within one year, on, &c., at, &c., unlawfully set fire to a barn and stable, containing straw, &c., whereby the same were burnt and destroyed. The plaintiff having obtained a verdict at the trial, a rule nisi was obtained by *Cooper* in last *Michaelmas* term for arresting the judgment, on the ground that the action

ought

ought to have been brought against all the inhabitants of the hundred, and not against two of them only.

1823.

JACKSON
against
PEARSON.

Storks now shewed cause. The defendants ought to have availed themselves of this objection by plea in abatement. Although in form tort, the cause of action arises quasi ex contractu; for it may be considered to arise out of an implied contract by all of the inhabitants of the hundred to be responsible for damage arising from injuries of the nature described in the declaration. The riot act of the 1 G. 1. s. 2. c. 5. gives the action against two of the inhabitants of the hundred. It is true, that in *Steward v. Howey* (a), it was held that, under the statute of *Winton* the declaration must be against the inhabitants of the hundred generally. There the action was against eight persons by name, and it was held to be bad upon error. But that statute was very differently worded. The 9 G. 1. c. 22. s. 7., upon which this action is founded, after stating that all the inhabitants of the hundred are to make satisfaction, goes on to say, "that if such person shall recover in such action, and sue execution against any of such inhabitants, all other the inhabitants of the hundred shall be rateably taxed towards an equal contribution for the relief of such inhabitant against whom such execution shall be had and levied." The legislature, therefore, contemplated that execution might issue against any inhabitant, and consequently that the party injured might recover in an action brought against any inhabitant of the hundred.

(a) 5 Keble, 126.

1823.

1823.
Hilary
Term
1823.

Cooper contra was stopped by the Court.

BAYLEY J. I am of opinion that the rule for arresting the judgment must be made absolute. The 9 G. 1. c. 22. s. 7. gives to the party injured a remedy in cases where none existed before. That remedy must be strictly pursued. The words are, "that the inhabitants of every hundred shall make full satisfaction and amends to all persons for the damages they shall have sustained by the acts therein mentioned, (one of which is setting fire to any house, barn, &c.) which shall be done by any offender against the act; and that any person who shall sustain damages by any of the offences therein mentioned, shall be enabled to sue for and recover such damages, the sum to be recovered not exceeding the sum of 200*l.*, against the inhabitants of the said hundred, who shall be made liable to answer all or any part thereof: and that if such person shall recover in such action, and sue execution against any of such inhabitants, all other the inhabitants of the hundred shall be rateably and proportionably taxed towards an equal contribution for the relief of such inhabitant against whom such execution shall be had and levied." The inhabitants of the hundred are to make the satisfaction, and the inhabitants are to be sued. The persons liable to the damages are the persons who are the inhabitants of the hundred at the time when the damages are recovered and levied. Here the two defendants may have been inhabitants of the hundred at the time when the action was commenced, but non constat that they will continue so until the time when the damages are levied. If they do not, they will not be liable under this statute to contribute to the costs and damages recovered.

recovered. Now, if this action be maintainable against them, it would have the effect of making them personally responsible for the damages even after they had ceased to be inhabitants of the hundred. That is contrary to the intention of the legislature. For these reasons I think the rule for arresting the judgment must be made absolute.

HOLROYD J. I am of opinion that this objection is valid in arrest of judgment or upon error. The statute gives an action, not against individuals, but against a class of persons constituting a fleeting body, who, for the purpose of defending suits, are to be considered in the nature of a corporate body. Here the action is brought against the defendants as individuals; and if well brought, the judgment may operate against them as individuals. They and their personal representatives will be liable upon the judgment. Now, although the language of the latter part of the clause speaks of execution issuing against any of the inhabitants, yet it sufficiently appears from the whole of the section to have been the intention of the legislature that no persons should be liable to contribute towards the damages and costs except those who are inhabitants at the time when they are levied. They are to be liable only as long as they continue inhabitants. But if this action were maintainable against the two defendants, they would be personally liable upon the judgment, although they have ceased to be inhabitants of the hundred. That being so, I am of opinion that the action against two defendants is not maintainable, and that the judgment must be arrested.

1823.

~~Bankrupt~~
against
~~Bankrupt~~

BEST J. The case in *Keble* is an authority to shew that this action is not maintainable against the two defendants. It has been the constant practice in actions upon the statute, to declare against the inhabitants at large. That was the course pursued in *Thurtell v. The Inhabitants of the hundred of Mutford (a)*, and *Fowler v. The Inhabitants of Loninborough. (b)* If the action were maintainable against any two of the inhabitants, it might have the effect of continuing their liability after they cease to be inhabitants; and that is manifestly contrary to the intention of the legislature.

Rule absolute.

(a) 3 East, 400.

(b) 1 Brod. & B. 64.

Watson v. Peach 1-Yes. Cr. 327
Leah v. Sunday 5 Holl. & K. 408

LINGARD and Another, Assignees of FRY, a
Bankrupt, against MESSITER.

In an action by the assignees of a bankrupt brought to recover property in the bankrupt's possession as reputed owner, the plaintiff proved that the bankrupt had once been the real

TROVER for machinery, consisting of scribbling-engines, tuckers, and spinning-jennys. At the trial before *Richardson J.*, at the last assizes for the county of *Somerset*, the plaintiffs proved an act of bankruptcy to have been committed in *May, 1818*, a good petitioning creditor's debt, and the issuing of the commission on

owner of the goods in question, and that he continued in possession of them until he committed an act of bankruptcy: Held, that this was prima facie evidence that he continued in possession as owner, and that it then lay upon the defendant to prove that the bankrupt had ceased to be the reputed owner. The defendant proved that, long before the act of bankruptcy, the goods had been seized under an execution, at the suit of a creditor, by the sheriff, and that they were conveyed by bill of sale to the creditor, and that he afterwards demised them at an annual rent to the bankrupt, who continued in possession of them till the time of his bankruptcy. Soon after the bill of sale was executed, the creditor's initials were marked on all the goods: Held, that this was no evidence of the notoriety of the change of property; and, consequently, that there was no evidence to go to the jury that the bankrupt had ever ceased to be the reputed owner.

the

See separate entry in the

Edgmon 213 & 309

the 27th *September*, 1819. The bankrupt had carried on the business of a clothier for many years, and was originally possessed of the machinery in question, as his own property, and continued to use it in his business down to the time of the act of bankruptcy. In *Trinity* term, 1815, the defendant obtained two judgments against the bankrupt for 1500*l.*, and issued an execution thereon; and by deed reciting the two writs of execution, and that the sheriff had agreed to sell for 1050*l.* to the defendant the goods mentioned in the schedule, which were the machinery in question, the sheriff and *Fry* assigned and confirmed to the defendant all the said goods. On the 22d *November*, 1815, the defendant, by deed reciting the assignment, demised the machinery in question to the bankrupt for twelve months, at the rent of 10*l.* per month. This latter deed contained covenants by the bankrupt to pay the rent, and repair the machinery, and a proviso, that if the bankrupt should fail in any of the covenants, or be incapable of carrying on the business, by bankruptcy, death, or otherwise, the deed was to be void, and the defendant was to be at liberty to take the goods and dispose of them. The bankrupt had possession of the goods for the year, and paid the rent, and at the expiration of that year, it was agreed between the bankrupt and the defendant, to renew the letting for another year upon the same terms. The whole rent was paid by the bankrupt up to 1818. After the first demise the initials of the defendant's name, *N.M.* were put upon every article. The defendant then endeavoured to prove, that the bankrupt did not continue in the possession of the machinery until the act of bankruptcy was committed; but upon that point there was contradictory evidence. One wit-

1823.

Lawrence
against
Masson.

1823.

1823.
1824.
1825.
1826.
1827.

ness stated it to be a well-known usage to let machinery to clothiers. The learned Judge was of opinion, that the property was in the possession, order, and disposition of the bankrupt, by the consent of the true owner, within the 21 Jac. 1. c. 19.; and he left it to the jury to find, upon the evidence, whether the possession continued in the bankrupt until the time of the act of bankruptcy. They found that it did, and the verdict was accordingly entered for the plaintiffs. A rule nisi for a new trial having been obtained in last *Michaelmas* term,

Selwyn shewed cause. *Lingham v. Biggs* (a) and *Bryson v. Wylie* (b) are authorities to shew that the bankrupt had the machinery in question in his possession, order, and disposition, within the meaning of the 21 Jac. 1. c. 19. The plaintiffs, by shewing that the machinery had once been the property of the bankrupt, and that it continued in his possession down to the time of the act of bankruptcy, made out a *prima facie* case to entitle them to recover: for where a person who has at one time been the owner of property, continues in possession of it, the presumption is, that he continues in such possession as owner. The defendant did indeed prove, that the real ownership had ceased before the act of bankruptcy, but the reputed ownership would continue as long as the possession continued, unless it was made notorious to the world that there had been a change of property. *Knowles v. Horsfall* (c) is an authority to shew that the marking of the name of the purchaser upon the goods is not sufficient evidence that the change of possession is notorious, so as to take the case

(a) 1 Bos. & P. 82.

(b) *Ibid*, note.

(c) 5 B. & A. 134.

out of the statute. As to there being an usage to rent and hire such machinery, that was only spoken to by one witness, and no stress was laid upon it at the trial. Besides, in *Thackthwaite v. Cock* (a), *Mansfield C. J.* lays it down that the custom must be such, that persons dealing with traders, may see and know that the goods may possibly not be the property of the possessor. The defendant not having proved any notoriety of the change of property, there was no evidence to go to the jury to shew, that the reputed ownership which had been proved to have been at one time in the bankrupt had ceased.

Gaslee, contra. The fact of the sheriff having been in possession under an execution of these goods, was evidence that the change of property was notorious in the neighbourhood. In *Watkins v. Birch* (b), where a defendant had confessed judgment, and the creditor having taken his goods in execution, bought them by public auction, and took a bill of sale for a valuable consideration from the sheriff, and afterwards let the goods to the former owner for a rent which was paid, it was held, that that creditor had a good title, which could not be impugned as fraudulent by other creditors, having executions against the same defendant. Besides, in this case it was proved to have been the usage to rent such machinery. In *Horne v. Baker* (c) it was expressly laid down, that where there was a usage to rent and hire vats for the purpose of distilling, the possession and use of such articles would not carry the reputed ownership. The

(a) 3 *Taunt.* 490.(b) 4 *Taunt.* 823.(c) 9 *East*, 215.

1822
—
Laneall
against
Mason

notoriety of the change of property in this case was a question of fact, and ought to have been submitted to the jury.

BAYLEY J. I am of opinion, that there is no ground for disturbing this verdict. In *Lingham v. Biggs*, a person who was allowed to have possession of goods, under circumstances which give the reputation of ownership, was considered as having the order and disposition of them, within the meaning of 21 Jac. 1. c. 19. s. 11. In actions brought by the assignees of a bankrupt to recover property possessed by the bankrupt as reputed owner, it lies upon them to shew, in the first instance, that the bankrupt was the reputed owner at the time of his act of bankruptcy. There are two classes of cases where property demised to the bankrupt has been held to pass to his assignees, under the stat. 21 Jac. 1. c. 19.; the first is, where the bankrupt has once been the owner, the other where he has not. The evidence required to establish reputed ownership in each of these cases is different. In the former case, when it is once proved that the bankrupt has been the owner, and has continued in possession till the time of the act of bankruptcy, the presumption is, that he then continued in possession in the character of owner, and, therefore, proof of those facts is *prima facie* evidence that the bankrupt is both reputed and real owner. In the latter case, the mere possession of the things demised, may not of itself be sufficient to shew that the bankrupt was the reputed owner of them; and it may then be necessary for the assignees to establish that fact by other circumstances. In this case, it was proved that the bankrupt was once the owner of the machinery, and the jury have found that it continued in

his

his possession to the time of the act of bankruptcy. That being so, the reputed ownership must be presumed to have continued as long as the possession continued. It was proved that he had ceased to be the real owner, but he would continue to be the reputed owner until it had been made notorious to the world that he had ceased to be the real owner. It has been held, that where there has been a public sale of property under an execution, the new owner may permit the former owner to continue in possession; and that, in the event of the bankruptcy of the latter, the property will not pass to his assignees. In that case the change of property becomes notorious by the public sale. If the vendee, however, permits the former owner to continue in possession, without making the change of property notorious to the world, the consequence will be, that in the event of his bankruptcy, it will pass to his assignees, as being in his order and disposition, within the statute of *James*. The question of reputed ownership, generally speaking, is a question of fact for the jury; but when it is once proved, in an action brought by the assignees of the bankrupt, that the latter, who was the former owner of the goods, continued in possession till the time of his act of bankruptcy, it must be taken that he continued in possession as owner till that time, unless it be shewn by the defendant, not only that there was a change of ownership, but that that change of ownership had become notorious to the world. Now in this case the defendant did not give any evidence to prove the notoriety of the change of ownership, and that being so, I am of opinion, that there was no evidence to go to the jury upon that question, and that the rule for a new trial must be discharged.

1848.

LINGARD
against
Manning.

HOLROYD J. I am of the same opinion. The property in this case was demised to a person who had been the owner, and continued in his possession till the time of his act of bankruptcy. If it had been demised to a person who never had been the owner, and he afterwards became bankrupt, the mere possession might not be sufficient to shew that he was either the real or reputed owner. The plaintiffs, by shewing that the property once belonged to the bankrupt, and that he continued in possession until the time of the act of bankruptcy, made out a *prima facie* case, that he was not only the reputed but the real owner. The defendant has shewn that there was a change of property previously to the act of bankruptcy, and that the bankrupt, therefore, was not then the real owner. But it was also incumbent upon the defendant to shew that the bankrupt was not then the reputed owner, and for that purpose to prove that the change of property had become notorious to the world. The fact of the goods having been seized under an execution, and the sheriff's officer having been in possession, was at most only evidence of the notoriety of their having been taken in execution. That execution, however, might have been withdrawn, in consequence of the debt having been paid; and the very circumstance of the bankrupt's having afterwards continued in the possession of the machinery, might well have induced others to believe that such was the fact, and that he still continued the owner. I think, therefore, that there was not any evidence to go to the jury to shew that the bankrupt had ever ceased to be the reputed owner of these goods, and that being so, the verdict is right, and this rule must be discharged.

BEST

BEST J. If the machinery had been let to a person who had never been the owner, and he had become bankrupt, it would have been for the plaintiffs to shew, not only that the bankrupt was in possession, but that he was in possession under such circumstances as might fairly induce others to think and treat him as real owner. In such a case, the mere possession might not be sufficient to induce others to consider him as the owner. But the very fact of the continued possession of property by a person, who at one time is proved to have been the owner, raises a presumption that he still possesses it in the character of owner. The plaintiffs have established the fact, that the bankrupt was once the owner of the machinery in question, and that he continued in possession of it till the time of the act of bankruptcy. It was then incumbent upon the defendant to shew that the property was left in the possession of the bankrupt, under circumstances which could lead no man to suppose that he was the real owner. The defendant has in fact proved that the bankrupt had ceased to be the real owner before his bankruptcy, but not that he had ceased to be the reputed owner, for he did not shew that the change of property was notorious to the world. In *Knowles v. Horsfall* the fact of the initials having been written upon the casks was held not to be sufficient evidence of the notoriety of the change of property. *Lingham v. Briggs* and *Bryson v. Wylie*, are authorities to shew that this machinery was in the possession, order, and disposition of the bankrupt within the 21 Jac. 1. c. 19. Upon the whole, I am of opinion as the plaintiffs did establish that the bankrupt was the reputed owner of the machinery, and that

1823.

 LINGARD
 against
 MESSRS.

1823.

LINGARD
against
MEXMER.

as the defendant did not shew that that reputed ownership had ever ceased, there was no evidence to go to the jury upon that point. The verdict was therefore right, and this rule must be discharged.

Rule discharged. (a)

(a) *Sir Pichstock v. Lyster*, 5 M. & S. 371.

FLANAGAN *against* WATKINS.

A bond conditioned to keep the plaintiff harmless from the payment of an annuity, and from all actions, suits, damages and costs which should be brought against him, or that he might sustain by reason of the non-payment of the annuity, is not a bond for payment of money only within statute 3 Jac. 1. c. 8.; and, consequently, upon error brought to reverse a judgment obtained in an action on such bond, bail in error are not required.

ACTION upon an indemnity bond, the condition of which was, that the defendant should keep the plaintiff harmless and indemnified from the payment of an annuity, and all loss, damages, and expenses; and from all the covenants, conditions, provisoes, declarations, and agreements in a certain indenture (by which the annuity was granted) and warrant of attorney contained, and from the payment of all sums of money to grow due thereon; and from all actions, suits, loss, costs, charges, damages, and expenses whatsoever, which should be brought, carried on, or prosecuted against him, or that the plaintiff should at any time thereafter sustain by reason of the non-payment of the annuity. The plaintiff having obtained judgment upon demurrer (a), afterwards upon a writ of inquiry executed before the Lord Chief Justice, the damages were assessed at 2175*l*. The defendant afterwards sued out a writ of error into the Exchequer Chamber. A rule nisi had been obtained, calling upon the defendant to shew cause why the plaintiff should not be at liberty to sue out

(a) *Vide* 3 Barn. & A. 190.

execution,

execution, notwithstanding the writ of error, on the ground that it was brought for delay, and that no bail in error had been put in. The defendant swore that he had been advised by counsel, that there was error upon the record.

1833.

FLAMAGAN
against
WARRING.

Platt now shewed cause. This is not a mere bond for the payment of money within the 3 Jac. 1. c. 8., but the condition is for the payment of money and for doing other things; for the defendant is to save the plaintiff harmless, not only from the payment of the annuity, but from all actions, suits, loss, damages, and expences which he might incur by reason of the non-payment thereof. He cited *Gerard v. Danby* (a), *Thrale v. Vaughan* (b), *Butler v. Brushfield* (c), and *Hammond v. Webb*. (d)

Evans contra, cited *Scot v. Brace and Others* (e), and *Chauvet v. Alfray* (f); in the latter case the statute was held to be remedial. It ought, therefore, to receive a liberal construction. Now, here the bond is substantially conditioned for the payment of money. The surety can never be called upon if the annuity be regularly paid, and if called upon, he can satisfy the obligation cast upon him by the payment of the annuity, and the defendant will only be liable to that extent, viz. for the payment of money.

BAYLEY J. The practice of suing out writs of error for the mere purpose of delay is a public mischief, and

(a) *Cartlow*, 28.(c) 10 *East*, 407.(e) 6 *Mod.* 38.(b) 2 *Strange*, 1190.(d) 10 *Mod.* 281.(f) 2 *Burr.* 746.

ought,

1832.

—
 ELANOR
 against
 WATKINS.

ought, therefore, to be narrowly watched by the Court. It may, perhaps, be very fit to be considered, whether a writ of error ought in any case to operate as a stay of execution, unless it be shewn to the Court in which the judgment has been given, that there is reasonable ground to suppose that there is actual error. Whenever that question shall be brought properly before the Court, I shall be prepared to give it the fullest attention, and shall endeavour to pronounce an unbiassed judgment. Here the defendant has sworn, that he is advised by counsel that there is error; and, therefore, no such question arises in this case. The point here is, whether bail in error be required by the 3 Jac. 1. c. 8. That statute enacts, "that no execution shall be stayed or delayed by any writ of error, or supersedeas thereupon to be sued for the reversing of any judgment in any action or bill of debt upon any single bond for debt, or upon any obligation with condition *for the payment of money only*, or upon any action or bill of debt for rent, or upon any contract unless the recognizance be entered into as therein required." Now the question is, whether the bond in this case was a bond for the payment of money only. The condition is to save the plaintiff harmless from the payment of an annuity, and from all actions and costs which he should sustain in consequence of the non-payment of it. Now, if the annuity had been in arrear, the plaintiff might have been damnified by being sued, arrested, and taken in execution. And he would clearly be entitled under this bond to recover against the defendant a compensation in damages for any injury he had so sustained. This is a bond, therefore, not only for the payment of money, but to save the plaintiff harmless from all those consequences. It is not, therefore,

fore, a bond within the statute of the 3 Jac. 1. c. 8.; and consequently, this rule must be discharged.

1825.

~~Parsons~~
against
Watkins.

HOLROYD J. This is not a bond absolutely for the payment of money, for it might be satisfied without the payment of any money. As for example, if the defendant had conveyed to the plaintiff an estate, of which the annual profits were sufficient to discharge the annuity.

BEST J. concurred.

Rule discharged.

RAMSDEN and SPARMAN *against* GIBBS.

DEBT for duties. At the trial before *Abbott C. J.*, at the *Westminster* sittings in last *Trinity* term, a verdict was found for the plaintiff, for 10*l.* debt and 1*s.* damages, subject to the opinion of the Court on the following case:

The plaintiffs were the farmers and authorised collectors of the duties imposed by the several statutes in respect of all horses let to hire, or hired within the cities of *London* and *Westminster*, and the county of *Middlesex*; and the defendant was a person licenced according to the form of the same statutes, to let to hire, horses, mares, and geldings, and resided within

In order to make horses let to hire liable to the post-horse duty, they must be let to be used in travelling: Held, that it was a letting to hire to be used in travelling, where a horse was hired in *London* to go to *Richmond* and back, to return the same day, that being an ascertained distance of twenty miles. So, where a horse was hired

for fourteen days to go a journey. But not where it was to be used to go ten or twelve miles into the country and back the same evening; or where it was to be used for an hour or two for an airing; or where it was to be used in riding many miles into the country and back the same day.

CASES IN HILARY TERM

five miles of the head-office of stamps, and was a person usually letting horses to hire.

On the 11th April, 1821, J. Chapman hired of the defendant a saddle-horse for a day, to be used, and which, under that hiring, was used for the purpose of riding the same horse to the distance of many miles from *Little Moorfields*, into the country and back on the same day, for his pleasure; the distance which the horse was to go under that hiring not being, at the time of such hiring, ascertained. At the time J. Chapman hired the horse, he asked the defendant what he should charge him for the same, who replied, 9s., which Chapman paid him.

On the 12th April, 1821, Chapman hired of the defendant, in *Little Moorfields*, another saddle-horse to be used, and which, under that hiring, was used on the day then next following for the purpose of Chapman's riding the same, from *Little Moorfields* to *Richmond* and back again, the same being a distance of 20 miles. The defendant upon that occasion, charged to and received from Chapman, in respect of the same horse for such hire, the sum of 9s.

On the 13th April, Chapman hired of the defendant in *Little Moorfields* aforesaid, another saddle-horse to be used, and which, under that hiring, was used on the day then next following for the purpose of Chapman's riding the same 10 or 12 miles, the distance which the same horse was so hired to go, not being any further, or otherwise ascertained at the time of the hiring thereof, than that it was for 10 or 12 miles. The defendant on that occasion, charged to and received from Chapman, in respect of the same horse for such hire, the sum of 9s.

On the 14th April, in the same year, the said J. Chapman hired of the defendant, and the defendant let to hire to the said Chapman in *Little Moorfields*, another saddle-horse, to be on that day used, and which, on that day, under the same hiring, was used for the purpose of his riding thereon for an airing, from *Little Moorfields* into the country for an hour or two. The time and distance were not at the time of such hiring any farther or otherwise ascertained. The defendant upon that occasion charged to and received from Chapman, in respect of the same horse for such hire, the sum of 4s.

On the 21st April, in the same year, Chapman hired of the defendant, and the defendant let to hire to Chapman in *Little Moorfields*, another saddle-horse for 14 days, then next following to be used, and which, under such hiring, was used for such 14 days for the purpose of Chapman's riding, the same on a journey, the distance which the same horse was hired to go, not being at the time of such hiring ascertained. The defendant upon that occasion charged to and received from Chapman in respect of the horse for such hire, the sum of 2l. 9s.

The defendant did not pay any post-horse duty, in respect of any of the said horses so let to hire as aforesaid. But before any of the lettings to hire, he had duly entered in his returns to the assessed taxes the horses so let to hire, and paid the duty of 2l. 17s. 6d. per horse on each for the current year.

By, for the plaintiff. By the statute 44 G. 3. c. 98. the old duties were repealed, and the following duties imposed, "upon every horse hired by the mile or stage, to be used in travelling in Great Britain, a duty

1823.

Wm. A. G. 4.
 v. The
 Commissioners
 of the
 Great
 Britain.

of three half-pence for every mile for which such horse is hired, and the like duty upon every horse hired for a less period of time than 28 successive days for drawing on any public road any coach or other carriage used in travelling post or otherwise, if the distance at the time of the hiring shall be ascertained. Upon every horse so hired as last above mentioned, where the distance shall not at the time of such hiring be ascertained, for each day for which such horse shall be hired, 1s. 9d. The 1 G. 4. c. 86. s. 3. begins by reciting, "to prevent doubts which have arisen respecting horses let to hire, to be used in travelling in *Great Britain*," and then enacts and declares, "that the duty of 1s. 9d. per day imposed by the 44 G. 3. c. 98., upon every horse hired for drawing upon any public road any coach or carriage, shall be deemed to attach and be payable for and in respect of every horse, mare, or gelding which shall be hired to be used in travelling, in all cases where the distance shall not at the time of such hiring be ascertained; and that, when the distance shall be ascertained, the duty of three half-pence for every mile of such distance shall be charged in respect of every such horse." The first hiring stated in this case must be considered a hiring for the day. The horse was hired to ride many miles for pleasure, and then the duty of 1s. 9d., originally imposed by the 25 G. 3. c. 51. s. 19., upon horses let by the day, or for a less period of time where the distance is not ascertained, attaches. For although it might have been a question, whether that duty would have attached by the provisions of 44 G. 3. c. 98., standing alone, there cannot, since the 1 G. 4. c. 86. s. 3., be any doubt about the matter.

In the second case, where the horse was hired to go to

Richmond

Richmond and back, the distance being ascertained, the duty of three half-pence per mile attaches. The terminus a quo and the terminus ad quem were fixed, and that was clearly an using of the horse in travelling. In the third case, the hiring was to go 10 or 12 miles, and was a hiring by the mile, upon which the duty of three half-pence attaches. In *White v. Beasley* (a), where a chaise and pair of horses were hired to take a person from *Kingston Crescent, Portsmouth*, to the dock-yard and back, being a distance of two miles upon a public road, it was held to be a travelling within the statute. In the fourth case, the horse was hired for a period less than a day, amounting to one hour and not exceeding two, and therefore the duty of 1s. 9d. attaches. In the fifth case, the horse was hired for 14 days to go a journey, and was, therefore, to be used in travelling, and the duty of 1s. 9d. a day attaches.

W. E. Taunton, contra. By the 44 G. 3. c. 98, the duty of 1s. 9d. attached only on horses drawing a carriage, and not on riding horses. The statute 1 G. 4. c. 88. was passed to remedy that inconvenience, and directed that it should be payable for and in respect of every horse hired to be used in travelling, in all cases where the distance was not ascertained, and that three half-pence should be payable for every mile where the distance was ascertained. The effect of the latter statute, therefore, was to impose the duty of 1s. 9d. per day upon every horse hired for the day where the distance was not ascertained. But, in order to make the duty attach in every case, the horse must be used in travelling. The duty is not payable in respect of every horse hired, but

(a) 1 Barn. & A. 162.

1823.

RAMSEY
against
Gibbs.

only in respect of every horse hired to be used in travelling. If it was the intention of the legislature, that the duty should attach on all hired horses, it would have been wholly unnecessary to have specified any purpose for which the horses so hired were to be used. In its ordinary meaning, the word travelling denotes the going to or from a particular place. It does not mean the taking a ride merely for pleasure or health. If that be so, the duty does not attach in the case where the horse was hired for the purpose of riding to the distance of many miles into the country and back for pleasure. Nor in the third case, where it was hired to go the distance of 10 or 12 miles into the country and back. Nor, certainly, in the fourth case, where the horse was hired for the purpose of taking an airing into the country for an hour or two. As to the second and fifth cases, it must be admitted that the duty was payable.

BAYLEY J. In order to make the subject liable to the payment of a tax, the language of an act of parliament ought to be clear and unequivocal, so as to leave no reasonable doubt of the intention of the legislature to impose a burden upon the subject. The statute of the 1 G. 4. c. 88. s. 3. is a declaratory statute. It does not impose any new duty, but was passed for the purpose of removing doubts. It declares, that the duty of 1s. 9d. imposed by the 44 G. 3. c. 98. upon every horse hired for drawing on any public road, shall attach in respect of every horse hired to be used in travelling, in all cases where the distance shall not be ascertained, and when the distance is ascertained, the duty of three half-pence for every mile of such distance shall be charged. The object of the legislature was not to impose a new duty, but to explain what was intended by the

the

the 44 G. 3. c. 98. *sched. B*, by which three half-pence per mile was to be paid in respect of every horse hired by the mile to be used in travelling, and in respect of every horse hired for a less period of time than 28 days by the mile or stage, for drawing on any public road any carriage used in travelling, if the distance at the time of hiring was ascertained, three half-pence for every mile. And in respect of every horse hired as last above mentioned where the distance was not ascertained, 1s. 9d. per day. Two duties were, therefore, imposed by this statute; the duty of three half-pence per mile where the distance was ascertained in respect of every horse used in travelling, whether used for riding or for drawing; and the duty of 1s. 9d. a day in respect of every horse hired for time, *for drawing on any public road* a coach or carriage where the distance was not ascertained. Under this statute, therefore, the duty of 1s. 9d. was not in express terms imposed in respect of a horse hired for the day to be ridden. The 1 G. 4. was passed to remedy that inconvenience, and declares that the duty of 1s. 9d. shall attach in respect of every horse hired to be used in travelling where the distance is not ascertained. The case of *Hanley v. Cubberly* (a) is an authority to shew, that in the second case hiring for the purpose of riding to *Richmond* and back, a distance of 20 miles, was a hiring by the stage for the purpose of travelling, and therefore liable to the duty of three half-pence per mile; and there can be no doubt, that in the fifth case, where the horse was hired for 14 days for the purpose of going a journey, the distance not being ascertained, the duty

1823.

Revised
against
Gross.

(a) 15 *East*, 257.

CASES IN HILARY TERM

PORT
1844.

WILLIAM
GIBBS
GIBBS

volutions of
of incense
made a toleran
at least a fo
edu yd hiev
83 2 2 2 2
of assinu 2 2 2
-or a 2 2 2 2
-no 2 2 2 2
-or 2 2 2 2
2 2 2 2

of 1s. 9d. a day attached. It was to be used in travelling. In the first case, the horse was hired to go many miles into the country and back for the purpose of pleasure. The place to which it was to go was not fixed. A person riding a horse for pleasure several miles into the country and back the same day, cannot be said to be using it in travelling. In the fourth case, the horse was only hired to take an airing for an hour or two. That certainly was not hired to be used in travelling. The third case, perhaps, admits of more doubt, but on the whole I am of opinion, that the horse was not even there hired to be used in travelling, the place to which the horse was to go not being fixed. The horse was hired to go 10 or 12 miles into the country to return in the evening. Now, a person riding a horse 10 or 12 miles into the country and returning in the evening, cannot be said to be travelling. I think, therefore, the plaintiff is entitled to recover in respect of the hiring mentioned in the second and fifth cases only, and judgment must be entered accordingly.

HOLROYD J. The only doubt I have entertained during the course of the argument, is in respect of the hiring mentioned in the third case, where the horse was hired to go 10 or 12 miles into the country to return in the evening. Generally speaking, the term travelling denotes the going to or from one fixed place to another, and therefore, where the horse was hired to go to *Richmond* and back the same day, I think it must be considered as hired to be used in travelling, nothing being stated to show any other purpose. In the third case, however, the party might in his discretion

be

pleased, and I think that a person so using

using a hired horse, cannot be said to be using it in travelling.

1822.

*Biddell
against
Leeder
& Pulham.*

BEST J. concurred.

Judgment for plaintiff, for the duties chargeable in respect of the second and fifth hirings.

BIDDELL, against LEEDER and PULHAM.

THIS was an action of special assumpsit, on an agreement to indemnify the plaintiff against certain charges and expenses. The cause was tried at the Summer assizes, 1821, for the county of *Norfolk*, before *Richardson J.*, when a verdict was found for the plaintiff, damages 466*l.*, subject to the opinion of the Court upon the following case. The plaintiff, being the owner of one sixteenth share of a certain brig, belonging to the port of *Woodbridge*, then lying in the river *Orwell*, out of the port of *Woodbridge*, entered into an agreement, with the defendants, as follows:—“Agreement made this 9th day of *January*, 1816, between *R. Leeder* and *I. Pulham* of the one part, and *A. Biddell* of the other part. The said *A. B.* doth hereby agree to sell, and the said *R. L.* and *I. P.* do agree to buy one sixteenth part or share of all that brig or vessel called *The Venus*, of the burthen of 146 tons, or thereabouts, and also one sixteenth part or share of all and singular the anchors, cables, ropes, masts, &c. to the said brig or vessel belonging or in anywise appertaining, which brig or vessel is now lying in the river *Orwell*, and belongs to the port of *Woodbridge*, whereof *I. T.* is or was master, at and for the price or sum of 38*l.*, to be paid by the joint note

An executory agreement to transfer a share of a vessel is void by the 54 G. 3. c. 62. s. 14, unless it contains a recital of the certificate of registry.

NOTE
Shaw v. Shaw
1841

of, and chief of the said *R. L.* and *I. P.* to the said *A. B.* this day twelve months, with lawful interest thereon. In consideration of which said sale, the said *R. L.* and *I. P.* do hereby agree to guarantee and exonerate the said *A. B.* from the payment of every bill, and every sort of expense that the said *A. B.* is now liable to pay, or may hereafter be liable to pay, for or on account of his said sixteenth part or share of and in the said brig or vessel, save and except the expenses already incurred for putting the said brig into the commons, and detaining her in the said river *Orwell*, which expenses are to be jointly paid by the said *A. B.* and *R. L.* to the said *I. P.*; and for the consideration aforesaid, the said *A. B.* doth agree to convey, at the expense of the said *R. L.* and *I. P.*, the said sixteenth part or share of and in the said brig or vessel, and of and in her anchors, cables, &c., when he the said *A. B.* shall be thereunto requested, according to the rules and regulations required by law for the transfer of shares of and in ships and vessels, which rules and regulations the said *R. L.* and *I. P.* do, and each of them doth agree to abide by and conform to, as soon as the said transfer shall be made to them or either of them by the said *A. B.*, and the said *A. B.* doth agree, that the said *R. L.* and *I. P.* shall have the earnings of the said vessel, according to the said sixteenth share, up to the day of the date hereof;” which agreement was signed by all the parties. The plaintiff, some time in the month of *February* following, executed a bill of sale to the defendant, *I. P.*, which was accepted by him. On the trial the plaintiff proved a notice to the defendants to produce the bill of sale, which was not produced. No parol evidence was given to shew whether or not the certificate of registry was recited therein.

therein. If the Court should be of opinion that the agreement was void, because the certificate of the registry of the brig was not recited therein, then a nonsuit to be entered, otherwise the verdict to stand. The case was argued by

MR. J.

MR. J.

MR. J.

MR. J.

MR. J.

Robinson, for the plaintiff. This question depends upon the 34 G. 3. c. 68. s. 14., which, after reciting the 26 G. 3. c. 60., and the doubts which existed as to the construction of it, proceeds in these words: "Be it enacted, that no transfer, contract, or agreement, for transfer of property in any ship or vessel, made or intended to be made after the 1st day of *January*, 1795, shall be valid and effectual for any purpose whatsoever, either in law or in equity, unless such transfer or contract, or agreement for transfer of property in such ship or vessel shall be made by bill of sale or instrument in writing, containing such recital, as prescribed by the said recited act." Now it is to be observed, that the expression used is not that the contract &c. shall be void, but that it shall not be *valid*; and, therefore, the latter part of the clause may be very fairly read thus: that such contracts, &c. shall not be valid unless made as by bill of sale, &c., containing a recital. Greater liberties than this have been taken with acts of parliament, where it has been necessary, in order to carry into effect the intention of the legislature. It was here manifestly the intention of the legislature, that nothing but the legal conveyance of the property should necessarily contain the recital of the certificate; and, where a bill of sale is executed in pursuance of a prior executory agreement, it never could have been meant that each of them should contain the recital. The bill of sale is the

1823.

Reported
in
Lancet

the only instrument carried to the custom-house, where nothing would be known about the executory agreement; and, therefore, that knowledge which these acts, were made to secure could not be obtained. If it be held, that an executory agreement requires such a recital, complex articles of partnership extending to shipping may be rendered altogether void, even although valid transfers of the ships have been afterwards made. [Holroyd J. It does not follow that they would be altogether void, although invalid as to the ships.] Then the agreement was afterwards confirmed and made valid by the bill of sale; and the agreement and bill of sale may be treated as one conveyance. *Ferrers v. Fermor*. (a) [Bayley J. That was the case of a bargain and sale, and a fine and recovery, the whole of which were held to operate as one conveyance.] In *Es parte Yallop* (b), the policy of the register acts is thus stated by the Lord Chancellor. "That it is for the public interest to secure evidence of the title to a ship, from her origin to the moment in which you look back to her history; how far throughout her existence she has been *British-built and British-owned*." Now it does not infringe that policy, to say, that an agreement to transfer, not containing a recital, shall be made valid by the subsequent execution of a bill of sale, containing all matters required by the statute. But, even supposing that the agreement would be void as a conveyance of the vessel, still it may be binding as a contract to indemnify. In *Kerrison v. Cole* (c) it was held, that though the 26 G. 3. c. 60. declares a bill of sale void to all intents and purposes: yet such a deed might be valid for other pur-

(a) *Cro. Jac.* 642.

(b) 15 F. 60.

(c) 8 East, 251.

power, though not as a conveyance. *Mans v. Lanks (a)* also shews that a deed void for one purpose may be valid for another. So here, the agreement might be valid, not as an agreement of sale, yet to indemnify, the sale being made valid by a legal instrument. In *Brewster v. Clarke, 2 Mer. 75.* the agreement was considered by the parties as an actual conveyance, not as an agreement to convey. [*Bayley J.* When was the purchaser entitled to the earnings?] The purchaser had no title whatever till the execution of the bill of sale; but then he was entitled by relation, from the time of the execution of the agreement.

1822.]

—
Bayley J.
Bayley J.
Bayley J.

Dover, contra. It is admitted, that if this agreement had expressly conveyed any present interest in the vessel, it would be void by the register act. Now it does contain words of present conveyance; for, after the agreement of one to sell and of the others to buy, a stipulation follows for the payment of the purchase-money, by a note to be given immediately. The instrument then proceeds, "in consideration of which said sale:" now, unless what had preceded was a sale, those words would be insensible. It then goes on to give the by-gone earnings to the purchasers, who were to discharge all expenses then incurred on account of the vessel. But it is contended for the plaintiff, that this was only an agreement to sell, and was made valid by the subsequent bill of sale. It does not, however, appear, that the bill of sale contained the proper recital; the facts stated respecting it are, that the defendants had notice to produce it, but neglected to do so; that

(a) 8 T. R. 411.

would

1823.

1823.
1824.
1825.
1826.
1827.
1828.
1829.
1830.
1831.
1832.
1833.
1834.
1835.
1836.
1837.
1838.
1839.
1840.
1841.
1842.
1843.
1844.
1845.
1846.
1847.
1848.
1849.
1850.
1851.
1852.
1853.
1854.
1855.
1856.
1857.
1858.
1859.
1860.
1861.
1862.
1863.
1864.
1865.
1866.
1867.
1868.
1869.
1870.
1871.
1872.
1873.
1874.
1875.
1876.
1877.
1878.
1879.
1880.
1881.
1882.
1883.
1884.
1885.
1886.
1887.
1888.
1889.
1890.
1891.
1892.
1893.
1894.
1895.
1896.
1897.
1898.
1899.
1900.

would entitle the plaintiff to give parol evidence of its contents, but would not, without more, raise a presumption that the certificate was recited. *Cooper v. Gibbons.* (a) The case of *Kerrison v. Cole* has been cited for the plaintiff, but there the covenant upon which the action was maintained was altogether independent of that which related to the ships; here, the undertaking to indemnify depended upon the principal agreement for the sale of the vessel. (He was then stopped by the Court.)

BAYLEY J. The object of the register acts was to make it notorious who has the actual legal interest in, or any thing to do with the ownership or controul of ships, and to remove all secrecy upon that subject. By the 26 G. 3. c. 60. s. 17., it was enacted, that the certificate of registry should be recited in every bill of sale of ships; but it being afterwards suggested, that vessels might be transferred without a bill of sale, the 34 G. 3. c. 68. was passed, upon the 14th section of which the present question turns. That section begins by reciting doubts; first, whether every transfer of property in ships must be by bill of sale; and, secondly, whether contracts or agreements for the transfer of such property may not be made without any instrument in writing, (which is the first time that mention is made of *agreements* to transfer,) and then proceeds to enact, that no such transfer, contract, or agreement, shall be valid or effectual for any purpose, in law or equity, unless it shall be made by bill of sale, or instrument in writing, containing the recital prescribed by the 26 G. 2. c. 60. s. 17.

(a) 3 Campb. 363.

That

That section, therefore, applies to actual transfers and to agreements to transfer. But it has been argued, that the words are not that the instrument shall be *void*, but that it shall not be valid: I confess I cannot feel the force of the distinction. We have been desired to read the section thus; "unless it be made valid by bill of sale, &c.:" but we should not be warranted in so doing, when the object of the legislature was plainly to extend the provision to agreements to transfer, as well as to actual transfers. By the latter, the property would immediately vest in the transferee, by the former (but for the act) he would take an equitable interest, until the completion of the sale; and in the meantime might have a material control over the use of the vessel. The object of the legislature would not be answered, unless it be made publicly known who has the equitable right to the controul and use of a ship. It is of importance to government to have the means of ascertaining, at any time, who have the power over the use and destination of ships, and the appointment of the masters. If, then, it was intended that the clause in question should extend to agreements, as well as to actual transfers, this case is clearly within it; but I also think, that the instrument contains words of present sale. The stipulation for interest, in the note, shews that it was to be considered as a present payment; then follow the words, "in consideration of which said sale." Now, no sale had been before mentioned, unless the former part operated as a sale. Under these circumstances, I think that the instrument should have contained a recital of the certificate of registry, and that the omission of that has rendered it invalid. The true distinction has been pointed out between *Kerrison v. Cole* and this case; here, therefore,

1823,
 1824,
 1825,
 1826,
 1827,
 1828,
 1829,
 1830,
 1831,
 1832,
 1833,
 1834,
 1835,
 1836,
 1837,
 1838,
 1839,
 1840,
 1841,
 1842,
 1843,
 1844,
 1845,
 1846,
 1847,
 1848,
 1849,
 1850,
 1851,
 1852,
 1853,
 1854,
 1855,
 1856,
 1857,
 1858,
 1859,
 1860,
 1861,
 1862,
 1863,
 1864,
 1865,
 1866,
 1867,
 1868,
 1869,
 1870,
 1871,
 1872,
 1873,
 1874,
 1875,
 1876,
 1877,
 1878,
 1879,
 1880,
 1881,
 1882,
 1883,
 1884,
 1885,
 1886,
 1887,
 1888,
 1889,
 1890,
 1891,
 1892,
 1893,
 1894,
 1895,
 1896,
 1897,
 1898,
 1899,
 1900,

3338.

~~Reverend~~
~~Justice~~
~~of the~~

fore, the plaintiff is not entitled to recover, and judgment of nonsuit must be entered.

HOLROYD J. It appears to me quite plain, that this agreement is void, because it does not contain any recital of the certificate of registry. The object of the register acts is said to be the disclosure of persons beneficially interested in ships. Such a construction must therefore be put upon those acts, as will carry that intention into effect. But if we were to decide that this agreement is not within the 34 G. 3. c. 68. s. 14., we should both take it out of the words, and defeat the object of the enactment. The 26 G. 3. c. 60. s. 10., requires, before a registry is made of any ship, that an oath should be taken, disclosing all the persons beneficially interested therein, and the subsequent provisions relating to the indorsements on the certificate, and the recitals in every transfer, have the same object in view. Here the bargain was for a present price, to be immediately secured, with legal interest; an agreement was made on the one part to sell, on the other to buy, and the benefit on each side was to arise immediately; that makes the instrument operate as a present sale. In agreements for leases such words convey a present interest, unless there are other words negating such an intention. But, whether it be so considered, or merely as an agreement to transfer, it is equally within the 34 G. 3. c. 68. s. 14., and therefore void for want of the recital thereby required. It has been argued, that nothing but an actual transfer is within the statute; but agreements to transfer are expressly included; and the section in question was made for the purpose of enlarging the provisions of the 26 G. 3. c. 60. s. 17. I

am,

am, for these reasons, of opinion, that the agreement in question is clearly void within the words and spirit of the 34 G. 3. c. 68. s. 14., and that a nonsuit must, therefore, be entered.

1822.

Brook
v. Burt
Dissent.

BEST J. I certainly have had doubts respecting the present question; but now think it quite plain, that the word "agreement" must, from the other words with which it is associated, and from the apparent intention of the legislature, receive the construction which has been put upon it by my Brothers. The 14th section of the 34 G. 3. c. 68., recites, that doubts existed respecting, first, transfers; and, secondly, agreements to transfer; and then proceeds to declare what shall be required in each case. Now, unless the word "agreement" is there applicable to executory contracts, it can have no meaning at all; and if we were to put a different construction upon it, the statute might be in a great degree evaded, for persons would then be content to have the profits and management of ships, without having the legal ownership, and might, therefore, remain unknown. It has been properly argued, that at all events those parts of the instrument which do not relate to the sale, will not be made void; but where a principal contract fails, all the subordinate ones fail likewise, and the contract to indemnify was subordinate to the contract to sell. In *Kerrison v. Cole*, the covenant upon which the action was brought, was not subordinate to, but entirely independent of the mortgage. For these reasons, I agree in thinking that a nonsuit must be entered.

Judgment of nonsuit.

1503

DOE, on the demise of THOMAS HENRY PLAYER,
against NICHOLLS.

A testator devised to trustees, in trust for his only son, all his freehold and copyhold lands, to be transferred to him as soon as he should attain to twenty-one years of age; and in case he should die before he attained to the age of twenty-one years, then to A. B., his heirs and assigns: Held, that the trustees took in the copyhold lands an estate for years, determinable on the son's attaining the age of twenty-one years, or by his death before that period.

EJECTMENT to recover certain copyhold premises in the parish of *Aldenham*, in the county of *Herts*, held of the manor of *Aldenham*. The lessor of the plaintiff claimed them as heir at law of his father, *Thomas Gregory Player*, deceased, who was the only child and heir at law of *Perry Player*, esquire, deceased. At the trial before *Wood B.*, at the *Hertford Summer assizes*, 1821, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on the following case:

Perry Player purchased the said copyholds held of the manor of *Aldenham*, and he also, at the same time, purchased certain freehold premises in the same parish of *Dinah Darby*; and on the 8th of *August*, 1769, the said *Dinah Darby*, out of court, surrendered the said copyhold premises into the hands of the lord by the acceptance of *Thomas Needham*, esquire, his steward, to the use of *Perry Player*, his heirs and assigns for ever. The surrender was presented and inrolled at a court held on the 12th *October*, 1769; and at a court held on the 30th *November*, 1769, *Perry Player* was admitted on the surrender, by his attorney, to the premises comprised therein, to hold the said premises to the said *Perry Player*, his heirs and assigns for ever. And at the same court *Perry Player*, by his attorney, surrendered the premises into the hands of the lord, to the uses of his last will. *Perry Player* died in *November* 1785, without having

having made any other surrender of the said premises, and by his will, duly made, executed, and attested, devised as follows: "I give to *W. Reade, W. May, and Ann Lowe*, in trust for my only son, *Thomas Gregory Player*, all the rest and residue of all my goods and chattels, and also my freehold and copyhold lands, which I have surrendered to the use of my will; likewise all my leasehold and lifehold estates, situated, lying, and being in the county of *Hertford*, and all other my effects, of what kind or nature soever, the same to be transferred to him as soon as he shall attain to 21 years of age. But in case he should die before he attain to the age of 21 years, then I give to my cousin *W. Player*, his heirs and assigns, all my freehold and copyhold lands, and the tithes thereof, lying at *Aldenham*, in the county of *Hertford*. And I hereby nominate and constitute the said *W. Reade, W. May, and Ann Lowe*, executors and trustees of this my will." *Perry Player* died, leaving the said *T. G. Player* his only surviving child, and his will was proved in the Prerogative Court of *Canterbury* on the 12th November, 1785, by *Ann Lowe* only, the two other executors having renounced. At the Manor Court, held on the 16th day of January, 1786, it was presented by the homage that *Perry Player* had died seised of the said premises. And at another court, held on the 4th December, 1786, *Ann Lowe* was, on the presentment of the death of *Perry Player*, admitted by her attorney to the said premises; to hold the said premises with their appurtenances, to the said *Ann Lowe*, upon the trusts of the said will of *Perry Player*, at the will of the lord, &c. *Ann Lowe* died in July, 1794, leaving *W. Reade*, and *W. May*, her surviving. *Thomas Gregory Player* attained the age of 21

1825.

But this
Player
against
Nicola.

1828.

Don't
Player
against
Nixon

years on the 24th *October*, 1793, and at a court held on the 20th *October*, 1794, (being during the lives of the said *W. Reade* and *W. May*,) was admitted to the premises by attorney on a presentment that *Ann Lowe* was dead; and that he, *T. G. Player*, had attained the age of 21 years, to hold the same to him, the said *T. G. Player*, his heirs and assigns for ever. *W. Reade* died in *January*, 1801, and *W. May* died in *May* 1809, leaving his great nephew, *W. May Lander*, who is now living, and an infant of the age of 18 years or thereabouts, his heir at law. No surrender or release from *W. Reade*, *W. May*, and *Ann Lowe*, or either of them, or from the heir of either of them, to the said *Thomas Gregory Player*, is recorded on the court rolls of the said manor either before or since the admission of the said *T. G. Player*. The latter died on the 24th *March*, 1818, leaving the lessor of the plaintiff, his eldest son and heir at law, him surviving. The question argued was, whether the legal estate was in the heir at law of the surviving trustee, or in the lessor of the plaintiff.

Rayley for the plaintiff. An estate in fee vested in *T. G. Player* upon his attaining the age of 21 years, and he having died seised of that estate, it descended to the lessor of the plaintiff. The trustees took, under the will of *Perry Player*, an estate determinable on the son's attaining the age of 21 years. By the devise to the trustees, the testator only intended to place his property under their control for a limited time, to manage the estates during the minority of his son. He gave no benefit whatever to the trustees, nor does he create any fund for the payment of debts, or for any other purpose. The object of giving his property to the trustees, being

for

for the management of it during his son's minority, of itself affords a presumption that he only intended to give them a term till his son attained 21. The testator had both the legal and equitable title, and he obviously intended that his son, when he attained to 21, should have both the legal and equitable interest, and the only question as to the copyholds is, whether the son was to take them by his title of heir upon the expiration of a term given to the trustees, or by a conveyance of the fee from them. Now if the testator, after the words "to be transferred to him as soon as he shall attain to 21 years of age," had added, "and when, and as soon as he shall attain to 21 years of age, then I give to my son, *T. G. Player, &c.*;" it is clear, that the son in that case would have taken the vested fee at his father's death by descent, and not under the will. But a devise to the heir is wholly void. In *Ellis v. Smith* (a), Lord *Hardwick* doubted whether a will devising all the testator's estates to his heir could be made available, even for the collateral purpose of revoking a prior will devising the estates from the heir; the testator having executed the last will according to the fifth and not the sixth section of the statute of frauds. In *Boulton's case* (b), "One devised lands to his wife till his son should attain the age of 21 years, and then that his son should have the land to him and his heirs, and if he should die without issue before his said age, then to his daughter; this was held a good executory devise to the daughter." Mr. *Fearne* observes upon that case, "the first devise of the fee was to the son, who was the heir, and therefore, under the doctrine in *Boraston's case* (c), the son, taking

1823.

Don de
Player
against
Nicholls

(a) 1 Ves. jun. 17. (b) *Egerton*, cited in *Palmer*, 182. (c) 3 Rep. 19.

1823.

~~Don. down~~
~~Black~~
~~cont.~~
~~Number 101~~

the vested fee, would still have taken by descent and not by the devise, so that the immediate fee must be considered as undisposed of by the will." The question here is not what the testator has given to his son, but what he has taken away; whether the words "to be transferred," can be interpreted to indicate an intention in the testator to give the trustees a fee, and thereby to effect the legal disinherison of his son. He never takes away the beneficial interest from his son; even during the continuance of the estate in the trustees, that circumstance cannot affect the question of the legal disinherison, for this court cannot look at equities, *Doe v. Vernon*. (a) The question here is one of disinherison, and the heir is not to be disinherited even where the case is doubtful, *Gardiner v. Sheldon*. (b) If, therefore, it appears even doubtful, whether the testator intended to give the trustees more than a term, the lessor of the plaintiff will be entitled to recover. It may be argued, that the interest given to the trustees was not limited till the testator's son attained 21, but that they were to have a continuing legal estate which they were to transfer to him at that age. The whole sentence, however, is evidently one conception of the testator's mind. It does not terminate till the testator has named a finite period, at which he intended that the interest given to the trustees should determine. It is immaterial whether the testator fixed that period at the beginning or at the end of the sentence, whether he gave it to them for eight years only, or during the minority of his son, or whether having given it to them indefinitely, he made the ending of the term certain by directing them to deliver up the

(a) 7 East, 201

(b) *Faughan*, 202.

estates at a finite period of time. In the *Bishop of Bath's* case (a) it is said, that every lease for years ought to have a certain beginning, but that is to be intended when it is to take effect in interest or possession, and then the commencement ought to be *certain*; so also the continuance of it ought to be certain, but that is to be intended either when the term is made certain by express numbering of years, or by reference to a certainty, or by reducing it to certainty by matter *ex post facto*, or by construction in law by express limitation;” and the same doctrine is laid down in *Boraston's* case. (b) Besides it is a general rule, that the legal estate in the trustees should be carried only as far as was necessary to effectuate the purposes of the will, *Doe v. Bartrop*. (c) Now, all the purposes of the trust might be effected by the trustees taking an estate determinable on the son's attaining to the age of 21.

1823.
Doe v. Bartrop
Bartrop v. Doe
Bartrop v. Doe
Bartrop v. Doe

Abraham contra. The trustees under the will of *Perry Player* took an estate in fee. If an estate is devised to trustees in trust, to sell or mortgage in order to raise money for the payment of debts, and subject thereto in trust for a third person, the trustees take the legal estate in fee. For otherwise it would not be in their power to execute the trust, *Bagshaw v. Spencer*. (d) Now here the trustees are required to do an act to which the seisin and possession of the legal estate is necessary at the time the son attains the age of 21 years. For they are then to transfer the estate to him in the mode required by law, viz. by surrender of the legal interest then remaining in them. Here the trustees may be

(a) 6 Rep. 35.

(b) 3 Rep. 19.

(c) 5 Taunt. 382.

(d) 1 Ves. 142.

P. 2.
1823.
D. 4.
PLATE
NICHOLLS.

considered as admitted tenants of the legal estate. For one of them, *Ann Lowe*, was admitted, and the admission of one joint tenant is the admission of all, *Roe v. Hutton*. (a) [*Holroyd J.* The copyhold lands are devised to the trustees, and the copyhold lands are to be transferred. Now, a surrender is necessary to transfer the legal estate, but is not necessary to transfer the lands. No act is, therefore, required to be done by the trustees here, which they could not do if they took only an estate for a term.] Here, an equitable estate in fee is devised to the cestui que trust, and in the event of *T. G. Player's* dying under 21, the legal fee is devised to another person. *Purefoy v. Rogers* (b) and *Marshall v. Hill* (c) are authorities to shew that the testator must have intended the cestui que trust to take an equitable estate in fee, and his trustees a legal estate commensurate with his equitable estate, viz. an estate in fee.

BAYLEY J. It may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it. *Doe v. Simpson* (d), and *Doe v. Timins* (e), are authorities upon that point. The question, therefore, in this case is, what estate was necessary to enable the trustees to execute the purposes of the trust created by the will.

(a) 2 *Wils.* 162.

(c) 2 *M. & S.* 608.

(e) 1 *Barn. & A.* 530.

(b) 2 *Saund.* 380.

(d) 5 *East*, 162.

By the terms of the will, they are to be trustees for the son, to whom the estate is to be transferred when he attains the age of 21. The usual mode of transferring a copyhold estate is, that the person having the estate surrenders it to the lord, and suffers another person to be admitted as tenant on the rolls. If the trustees in this case took an estate in fee, it would be necessary for them to make an actual surrender of the estate, in order that it might pass from them to the surrenderee. If, however, the estate limited to them be determinable as soon as the object of the testator's bounty attain the age of 21 years, his admittance on the court rolls would operate as a transfer of the estate. It would not then be necessary that there should be a transfer of any interest from the trustees to him, in consequence of the determination of the trust estate at that period, and his admittance would be sufficient to satisfy the words "to be transferred." It seems to me, therefore, that the purposes of the will might be fully effectuated, if the trustees took an estate determinable when the son attained the age of 21 years. In the cases cited by the defendant's counsel, the trustees were to take the rents and profits in order to raise money by sale and mortgage for the payment of debts, and they could not in that case have had the means of executing the trust, unless they had the fee. Here, all the purposes of the trust might be answered by the trustees taking an estate determinable on the son's attaining the age of 21; and that being so, I am of opinion that they took an estate determinable at that period, and consequently, that the legal estate at the commencement of the action was vested in the lessor of the plaintiff.

1823.

Don. dem.
 P. 101
 101
 101
 101

1806!

The KING against The Inhabitants of ROTHER-
FIELD GREYS, OXON.

TWO justices, by their order, removed *Thomas Biffeld* from the parish of *Tooting Graveney*, in the county of *Surrey*, to the parish of *Rotherfield Greys*, in county of *Oxford*. Upon an appeal, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The pauper was born on the 22d of *November*, 1794, in the appellant-parish, where his father was settled. In 1807, the pauper's father removed with his wife and family, including the pauper, to the parish of *Tooting Graveney*, in the county of *Surrey*, and took a cottage there, which he has held ever since, at 3s. per week. The pauper resided at *Tooting Graveney* with his parents till 1813, when he enlisted in the marines, and went abroad in that service. He remained in the marines till the 8th *September*, 1815, when, in consequence of the reduction of that corps, after the peace, he received his discharge, and returned the same day to his parents at *Tooting*, being then under the age of 21 years, and resided with them from that time until some time after his father hired a stable in *Streatham*. About a year after the pauper's return home, the pauper being then more than 21 years of age, his father hired a stable, in the adjoining parish of *Streatham*, at 4s. a week, which he held for about nine months, still continuing to reside at the cottage at *Tooting Graveney*. The cottage and the stable together

A minor, having enlisted into the marines, was discharged from that service, and returned to his father's family before he attained the age of twenty-one years: Held, that he was not emancipated.

were

1823.

The King
against
The Inhabit-
ants of
BORTHWICK
GATE.

were above the annual value of 10*l*. The pauper had never done any act to acquire a settlement for himself.

Thesiger, in support of the order of sessions. The pauper, by enlisting into the army, became emancipated, for he thereby contracted a relation wholly inconsistent with the parental controul. In *Rex v. Walpole St. Peter's* (a) and *Rex v. Stanwix* (b), the paupers had attained the age of 21 before they returned to their father's family; but in *Rex v. Witton-cum-Twam-brookes* (c), Lord *Kenyon*, adverting to the case of *Rex v. Walpole St. Peter's*, stated, that it had been decided on the circumstance of the pauper's having contracted a relation which was inconsistent with the idea of his being in a subordinate situation in his father's family. And in *Rex v. Roach* (d) he uses nearly a similar expression; and in the late case of *Rex v. The Inhabitants of Wilmington* (e), *Abbott C. J.* states the contracting of some relation, which wholly and permanently excludes the parental controul, as one of the modes by which a child may become emancipated. Now here, the pauper had entered into a contract, which, as far as he was concerned, must have the effect of excluding, wholly and permanently, the parental controul; for he had subjected himself to the controul of the crown for the period of his life. It is true, that in this particular case, the latter controul had ceased before the pauper attained the age of 21 years. But that circumstance is immaterial, for he became emancipated the moment when he contracted a relation inconsistent with the

(a) *Burr. S. C.* 638. 2 *Boll.* 55.(b) 5 *T. R.* 670.(c) 5 *T. R.* 555. (d) 6 *Term Rep.* 247.(e) 5 *B. & A.* 525.

parental

parental controul. In *Rex v. Woburn* (a), which was the case of the drummer enlisting into the same regiment of militia in which his father was serjeant, it was held to be no emancipation. And in *Rex v. The Inhabitants of Hardwick* (b), which was also the case of a militia-man, it was determined, on the authority of *Rex v. Wulpole St. Peter's*, that, by serving till the age of 21, he was emancipated. The question, however, there turned principally on a distinction attempted to be raised between a voluntary and a compulsory separation from the father's family. At all events, it merely establishes, that service under an enlistment, up to the age of majority, will effect an emancipation. But there is this difference between a militia-man and a soldier in the regular army, or in the marines, that the contract of the former is for a limited term of service, and that in time of peace only occasionally required; the engagements of the latter are absolute for their lives, and accompanied with an immediate liability to be sent on foreign stations. Lord *Kenyon* himself takes this distinction in *Rex v. Woburn*.

1823.

The King
against
The Inhabit-
ants of
ROTHERFIELD
CHURCH.

Barneswall, contra, was stopped by the Court.

BAYLEY J. I am of opinion that the pauper was not emancipated. In order to constitute emancipation, the party ought to be wholly and permanently free from the parental controul. In this case, the pauper, by enlisting into the marines, became subject to the controul of the crown, and continued subject to that controul, as long as the period of his service continued; and if he had

(a) 8 T. R. 479.

(b) 5 Barn. & A. 176.

remained

1883]

The King
against
The Inhabitants
of
Roxburgh
County

remained in the army till the age of 21 years, his emancipation would undoubtedly relate back to the time of his enlistment; but before he attained the age of 21 years, the relation between him and the crown ceased, and he returned to and constituted part of his father's family, and of course again became subject to the parental controul. He, therefore, was not emancipated. This is consistent with the opinion of Lord *Kenny* C. J. and *Lawrence* J., in *Rex v. Roach* (a), and is consistent with the general rule laid down by the present Lord Chief Justice in the late case of *Rex v. The Inhabitants of Wilmington* (b), "That during the minority of a child, there can be no emancipation, unless he marries, and so becomes himself the head of a family, or contracts some other relation, so as wholly and permanently to exclude the parental controul." Now the pauper, in this case, by entering into the marines, did not, in the event that has happened, contract a relation, so as wholly and *permanently* to exclude the parental controul, for he returned to his father's family before he became of age, and again subjected himself to the parental controul. In the late case of *Rex v. The Inhabitants of Hardwick* (c), the Lord C. J. says, "That during the minority of a child, he will remain, almost under any circumstances, unemancipated; but where the new settlement is acquired by the parent, after the child has attained 21 years of age, it will not be communicated, unless in fact the child continues part of the family. When, therefore, at that period, he is absent, employed in getting a living for himself, or serving in the militia, he no longer remains a member of the family." In this case, the

(a) 6 T. R. 247.

(b) 5 Barn. & A. 525.

(c) 5 B. & A. 176.

pauper was, at the period when he attained to the age of 21 years, - living with his father, and constituting a part of his family. He was, therefore, not emancipated, and he acquires his father's settlement in *Tooting Graveney*, and the order of sessions must be quashed.

1823.

The King
against
The Inhabit-
ants of
Tooting Graveney

HOLROYD J. I am of opinion that the son was not emancipated so as to deprive him of the settlement gained by the father in the parish of *Tooting Graveney*. By the common law, the father is entitled to the controul of his child, unless some other circumstances occur to deprive him of his controul. By entering into the marines, the pauper ceased to be under the controul of his father, and became subject to the controul of the crown, as long as that state of circumstances continued. But before he attained the age of 21, he ceased also to be under the controul of the crown, returned to his father's family, and again became subject to his controul, and, consequently, was not emancipated. It has been said, that this being an engagement for life, constitutes in itself a complete and perfect emancipation. It was an engagement for life, so as to bind the pauper to serve for life, if required; but the duration of the service depends on the discretion of the crown. It may or may not last for life; and in this case it was terminated before the pauper attained the age of 21 years; so that the parental authority was not wholly and permanently excluded.

BEST J. By the general policy of the law of *England*, the parental authority continues until the child attains the age of 21 years; but the same policy also requires, that a minor shall be at liberty to contract an engagement

1828.

The King
against
The Inhabit-
ants of
ROTHESFIELD
GARY.

engagement to serve the state. When such an engagement is contracted, it becomes inconsistent with the duty which he owes to the public, that the parental authority should continue. The parental authority, however, is suspended but not destroyed. When the reason for its suspension ceases, the parental authority returns. This is perfectly consistent with the opinions of Lord Kenyon C. J. and Lawrence J., in *Rex v. Roach*, and with the general rule laid down by the present Lord C. J., in *Rex v. The Inhabitants of Wilmington*. In this case, the pauper, before he attained the age of 21 years, returned to his father's family, and again became subject to the controul of his father. He was not, therefore, emancipated at the time when the father acquired his settlement in the parish of *Tooting Graveney*, and, therefore, the order of sessions must be quashed.

Order of sessions quashed.

BODENHAM *against* PRITCHARD.

A. being the owner of an estate called *D.*, with a mansion-house upon it, in which he resided, purchased an adjoining estate, and occupied a part of it himself, together with the

D. estate, having removed some of the fences by which they had been separated; and afterwards devised to his widow for life "all and singular his mansion-house in which he then lived called *D.*, together with all buildings and lands thereunto belonging, as then enjoyed by him; and after her decease, all his said mansion-house called *D.*, with the lands thereto belonging, with the appurtenances, to his godson *J. S. B.*, his heirs and assigns for ever." Held, that the widow took an estate for life in that part of the newly-purchased estate which the testator occupied himself, as well as in the old *D.* estate; and that *J. S. B.* took a remainder in fee in all that was given to the widow for life.

TROVER for a quantity of timber trees. Plea, the general issue. At the trial before *Park J.*, at the *Hereford Lent* assizes, 1821, a verdict was found for the plaintiff for the damages in the declaration, subject to a reference as to the value of the trees, and subject to the opinion of this Court upon the following case.

The

The plaintiff is devisee under the will of the late *John Pritchard of Dolyvellin*, in the county of *Radnor*; and the defendant is the widow of the said *J. P.*, whose will, dated the 16th of *September*, 1814, contained the following devise: "I give and devise all and every part of my real estates of which I shall die possessed, of every nature and kind whatsoever, and wheresoever, with all and every their appurtenances thereunto belonging, unto *F. Bodenham*, of, &c. and *Charles Meredith*, of, &c. to hold to them, their heirs and assigns, to and for the several uses, intents, and purposes hereinafter limited, expressed, and declared of and concerning the same. To the intent and purpose, that the said *F. Bodenham* and *C. Meredith* do permit and suffer my wife, *E. Pritchard*, to have, hold, and enjoy all and singular my mansion-house in which I now live, called *Dollyvellin*, in the several parishes of *Hersop* and *Llangunllo*, in the said county of *Radnor*, together with all the buildings and lands thereunto belonging as now enjoyed by me, with all the appurtenances for and during the term of her natural life; and from and after her decease, then I give and devise all my said mansion-house, called *Dollyvellin*, with the lands thereto belonging, with the appurtenances, unto my godson *John Shearwood Bodenham*, (the plaintiff,) son of the late *J. Bodenham*, of, &c. and his heirs and assigns for ever; and as to all the rest of my said real estates which I may die possessed of, I give and devise the same and every part thereof unto my said wife, *E. P.*, her heirs and assigns for ever, she, my said wife, paying and discharging all the several annuities or yearly rent-charges out of the same; and also, she my said wife, paying and discharging all the several legacies hereinafter in this my will mentioned

1823.

 BODENHAM
 against
 PRITCHARD.

out

CASES IN HILARY TERM

1814
 1814
 1814
 1814
 1814

out of the said estates, if my personal estates should prove insufficient." The testator died in *September*, 1814, and the defendant became possessed of the premises so devised to her as above stated, and is now in possession thereof. The testator purchased the *Dollyvelling* estate in 1772, and occupied it to the time of his death, and in 1792, he purchased the *Upper Hall* estate close adjoining. At the termination of the then existing lease, about two years after the purchase in 1792, the testator took three pieces of land, all of which had formed part of the *Upper Hall* farm, into his own possession, and continued to occupy them with the *Dollyvelling* estate till the time of his death. Some of the fences were removed which separated those pieces of land from the old *Dollyvelling* estate, and a gate was opened from one of them into the garden belonging to *Dollyvelling* mansion-house. The rest of the *Upper Hall* estate, with the exception of the above-mentioned pieces so taken into his own hands, was, to the time of the testator's death, leased out to other tenants. The estate which the testator so occupied was called *Dollyvelling*, as it was always called before; the new fields added did not alter the name; there was no alteration of the names after *Pritchard* purchased, and a witness on the part of the defendant who had known the premises for 50 years, said, that he never understood *Dollyvelling* as comprehending any more after the union than before. Two meadows (part of the lands in question) were called *Dollyvelling* meadows when they belonged to the *Upper Hall* estate, and they are so called to this time. The defendant, since the death of the testator, has cut down and converted a quantity of timber, growing partly upon the old *Dollyvelling* estate,

and

and partly upon the several pieces of land above mentioned, as having been part of the *Upper Hall* estate, and since the purchase in 1792 occupied by the testator himself in the manner above described. The value of the timber so cut and converted is submitted to the decision of an arbitrator, and a verdict having been found for the plaintiff, subject to such reference, is either to stand for the whole amount of the timber felled, or to be reduced according to the opinion of the Court, as to the timber growing upon the pieces so taken from the *Upper Hall* estate as above stated.

1823.
 ———
 Decided
 upon
 Pritchard's

Puller for the plaintiff. The real question for the consideration of the Court is, whether those lands which once formed part of the *Upper Hall* estate, but were afterwards occupied by the testator, together with *Dollyvellen* mansion-house, passed by the first part of his will, and not by the residuary clause. For if they did so pass, the defendant took only an estate for life, and the remainder in fee being given to the plaintiff, he is entitled to recover the value of the timber which has been felled upon those lands. The words of the will are, that the trustees "do permit and suffer my wife, *E. Pritchard*, to have, hold, and enjoy all and singular my mansion-house in which I now live, called *Dollyvellen*, in the several parishes of *Heyop* and *Llangunllo*, in the said county of *Radnor*, together with all the buildings and lands thereunto belonging, as now enjoyed by me, with all the appurtenances for and during the term of her natural life, &c." [*Bayley J.* Was there sufficient belonging to *Dollyvellen* to satisfy the word "lands," without including any part of the *Upper Hall* estate?] There certainly was, but the

1898.
 ———
 BENTON
 v.
 BENTON

former part of the devise must be construed by the words "as now enjoyed by me." That expression makes it perfectly clear, that the testator intended to give his widow a life-estate in all that he had connected in enjoyment with the mansion-house at *Dollyvellen*. And immediately after the devise to the wife, the will proceeds, "And from and after her decease, then I give and devise all my said mansion-house called *Dollyvellen*, with all the lands thereunto belonging, with the appurtenances, to my godson *J. S. Bodenham*;" which clearly shews that the testator meant, that his godson should take in fee all that he had before given to his widow for life,

Campbell, contra. None of the fields which had belonged to the *Upper Hall* estate passed to the plaintiff, but those only which belonged to the mansion-house of *Dollyvellen*. The words of the devise to the widow are, "to have, hold, &c. all my mansion-house, &c. together with all the buildings and lands thereunto belonging." If the devise had stopped there, clearly no part of the *Upper Hall* estate would have passed; the mere occupation of these fields by the testator would not have affected the question. The fact of there being other fields belonging to the *Dollyvellen* estate, sufficient to satisfy the word "lands," is decisive; for if there be such, then it is not competent for a person claiming more to introduce evidence that more was intended to pass. The words, "as enjoyed by me," do not extend the operation of the devise, they merely refer to the words before used, "lands thereunto belonging;" and in order to make the fields in question, pass the jury should have found, that at the time when the will was made,

made, they did belong to the *Dollyvellen* mansion-house. There is not a single circumstance in favour of the plaintiff, except the mere occupation of these fields by the testator; for the removal of the fences by no means proves that he intended to annex them to the mansion-house of *Dollyvellen*.

1805.
HODGKIN
HITCHMAN

Fuller, in reply, was stopped by the Court.

BAYLEY J. If the intention of the testator be free from doubt, then we must give effect to it, if that can be done consistently with the fair import of the words which he has used. Here the testator was owner in fee of two estates, *Dollyvellen* and the *Upper Hall*. Having lived for many years at *Dollyvellen*, in 1792 he purchased the *Upper Hall* estate, which comes close up to the *Dollyvellen* mansion-house. It appears that a gate was opened from the garden into one of the *Upper Hall* fields, and he removed the fences which formerly separated several of the fields belonging to the *Upper Hall* estate, from those belonging to *Dollyvellen*. At the time of the testator's death, all the premises so united were in his own occupation. The rest of the *Upper Hall* estate was not occupied by him, but was let to various tenants. Under these circumstances he devises to his wife "all and singular his mansion-house, in which he then lived, called *Dollyvellen*, together with all the buildings and lands thereunto belonging." It has been argued, that if the devise had stopped there, it would have passed nothing more than those lands which were connected in title with *Dollyvellen* mansion-house: but then the testator adds, "as now enjoyed by me." Now what is the fair import of those words? It is, that the

1828.

~~Howe v. How~~
~~Howe v. How~~
~~Howe v. How~~

widow should have for her life all that had been connected in enjoyment by the testator's own act, and not merely that which was connected in title with the mansion-house of *Dollyvelling*; and his intention to give her all that is quite manifest. In questions of this nature, if the will gives two media of construction, it is not necessary that both should be applicable; if one of them be applicable, and the intention of the testator corresponds with it, that must prevail. Here, then, the words "as now enjoyed by me" furnish a medium of construction with which the intention of the testator clearly corresponds. But the words "thereunto belonging," which give the other medium, may also be considered applicable, for those words may, in their popular and more comprehensive sense, include all that was united in occupation, although not connected in title with the old *Dollyvelling* estate. The subsequent clause, devising to *J. S. Bodenham*, has not the words "as enjoyed by me;" but the testator having before explained what he meant by the words "thereunto belonging," the plaintiff would take a fee in all that was given to the widow for life, and is, therefore, entitled to the value of all the timber felled by the tenant for life.

HOLROYD J. I am of opinion, that all the lands in question passed by this devise. It is not a devise of the testator's "*Dollyvelling* estate," or "*Dollyvelling* lands," but of "his mansion-house called *Dollyvelling*, together with all lands, &c. thereunto belonging, with the appurtenances, as enjoyed by him." The latter words make it quite clear, but independently of them, the lands in
dispute

dispute would in common parlance be considered as belonging to the mansion-house of *Dollyvellen*.

.1822.

~~Boaden~~
~~Boaden~~
~~Boaden~~

BEST J. It is quite manifest that the testator intended that his godson, *J. S. Bodenham*, should take a remainder in fee in all that his widow was to have for her life; and it is equally clear, that she was to have a life-estate in the lands in question, without resorting to all the different parts of the will in order to discover that intention, which, I think, cannot properly be done. The words certainly give a description large enough to include all that had been occupied, together with the mansion-house at *Dollyvellen*, without the aid of the expression "as enjoyed by me." The real question is, what did the testator consider as belonging to *Dollyvellen*? not what was thought by others. He had united certain fields to it in occupation; and, therefore, when he afterwards describes the estate as lands belonging to *Dollyvellen*, he must have meant to include both the old estate and that which he had added to it. This certainly is the popular sense of the words. Suppose he had taken some fields from one farm and added them to another, surely he would afterwards have spoken of them as part of that farm to which they had been added. The plaintiff is, therefore, entitled to the value of all the timber felled.

Verdict to stand for the value of all the timber.

1823

Ross, Administrator de bonis non, *against*
PARKER.

Where a declaration states that, by a certain indenture, "It is witnessed, &c.," and sets out the very words of the deed, there is no variance, although the legal effect of the whole deed may be different from that which the part set out imports.

Where the defendant sets out on oyer a deed upon which the declaration is framed, he cannot, on demurrer, take advantage of a variance in an immaterial part between the deed as stated in the declaration and as set out on oyer.

COVENANT by the administrator de bonis non of *W. Enticknap*, deceased, with the will of the said *W. E.* annexed. The declaration stated, that, by indenture, made on the 2d day of *May*, 1805, between *J. Parker*, (the defendant,) and *Ann* his wife, of the first part, and the said *W. E.*, of the second part; one part of which said indenture, sealed with the seal of the said *J. Parker*, the plaintiff brings into court, &c., after reciting as therein mentioned: It is witnessed, that, for the consideration therein mentioned, they the said defendant, and *Ann* his wife, did bargain, sell, assign, transfer, and set over to the said *W. E.*, his executors, administrators, and assigns, all the part and share of her the said *Ann Parker*, of, to, in, or out of a certain sum of 2000*l.*, therein particularly described, subject as therein mentioned; to have, hold, and receive the same, and every part thereof, unto and by him the said *W. E.*, his executors, administrators, and assigns, as and for his and their own proper monies and effects, upon the trusts, nevertheless, and to and for the intents and purposes thereafter expressed, of and concerning the same; that is to say, upon trust, in the first place, out of the money which he or they should receive, under or by virtue of the said indenture, to retain unto himself or themselves so much and such sum and sums of money as would be sufficient to repurchase the sum of 200*l.*, 3 per cent. consolidated bank

bank annuities, in the said indenture before mentioned, and all interest and dividends which should be due in respect thereof, until the same should be repurchased and retransferred, together with all costs, damages, and expenses, incident to the recovery and receiving the money and interest intended to be thereby assigned as aforesaid. And the said defendant, for himself and for his wife, and for his and her heirs, executors, and administrators, did covenant, promise, and agree, to and with the said *W. E.*, his executors, administrators, and assigns, by the said indenture, that he the said defendant, and *Ann* his wife, his or her heirs, executors, or administrators, or some or one of them, should and would, at his, her, or their or some or one of their own costs and charges, on or before the 1st day of *June*, 1807, repurchase, replace, and make good the sum of 50*l.*, part of the said sum of 200*l.*, 3 per cent. consols, and transfer, or cause the same to be transferred, into the name of the said *W. E.*, or into the names of his executors, administrators, or assigns, to and for his and their own proper use and benefit. The covenant then proceeded to provide for the repurchase of three other instalments of 50*l.*, 3 per cent. consols, at stated periods; and the declaration contained separate breaches, for the neglect to repurchase each instalment, and profert was made of the letters of administration, and the letters testamentary of *W. E.* The defendant prayed oyer of the indenture, set it out verbatim, and demurred. Joinder in demurrer.

The indenture, as set out, (after reciting, amongst other things, that *Ann*, the wife of the defendant, was one of five children then living of *Robert Perry*, that *James Bracey Perry*, by his will, gave in trust the in-

1823.

—
Don
against
Parker

~~1893.~~
~~1893.~~
 Held
 against
 PARKER.

terest of 8000*l.* principal money to his wife, *Ann Perry*, for her natural life, and directed the same to be laid out in the funds, or public stock of 3 per cent. consolidated and reduced annuities, in the names of his said wife and of his son, *James Perry*; and after the decease of his said wife, gave to the children of the said *R. Perry* 2000*l.*, part of the said principal money, to be equally divided between them, share and share alike, when the youngest came of age; that the testator died soon after, that the will was duly proved, and the sum of 8000*l.* laid out, in the purchase of 3 per cent. consolidated annuities; that *R. Perry* had five children at the time of the death of the said *J. B. Perry*, and still living [of whom the said *Ann*, wife of the defendant, is one]; that the said *Ann* did, on the 6th of *March*, 1793, attain the age of 21 years, and intermarried with the defendant; that the said *Ann*, on attaining her said age of 21 years, did become entitled to one full and equal undivided fifth part of the said sum of 2000*l.*, subject only to the life-interest of the said *Ann Perry* therein; that the said *J. Parker* and *Ann* his wife, being in want of money, applied to the said *W. E.*, who, at their request, transferred to one *James Bonner* 200*l.* 3 per cent. consols, for which the said *J. B.* paid to defendant *J. Parker* and *Ann* his wife the sum of 116*l.* 2*s.* 6*d.*; and that the said *J. Parker* had agreed to repurchase the said sum of 200*l.* 3 per cent consols, in a certain manner;) proceeded thus: "This indenture witnesseth, that for and in consideration of the sum of 200*l.*, 3 per cent. consolidated bank annuities, and of the said sum of 116*l.* 2*s.* 6*d.*, of lawful money of *Great Britain*, by the said *J. B.* to the said *J. Parker* and *Ann* his wife, in hand well and truly paid, at or immediately

immediately before the sealing and delivery of these presents, the receipt whereof, &c.; and for securing unto the said *W. E.* the repurchase and retransfer of the said sum of 200*l.* 3 per cent. consolidated bank annuities, and the payment of the interest or dividends to become due or payable at the Bank of *England*, in the mean time, in respect thereof, they the said *John Parker* and *Ann* his wife have, and each of them hath bargained, sold, assigned, transferred, and set over, and by these presents do, and each of them doth bargain, sell, assign, transfer, and set over, unto the said *W. E.*, his executors, administrators, and assigns, all the part and share of her the said *Ann Parker*, of, to, in, or out of the said sum of 2000*l.*, so given and bequeathed unto the children of the said *Robert Perry*, in and by the said recited will of the said *James Bracey Perry*, deceased (subject to the life-interest of the said *Ann Perry* therein as aforesaid, and also subject to an assignment thereof, made for the purpose of securing the payment of 50*l.*, and interest for the same at the rate of 5*l.* per cent. per annum, to *John Burt*, and also subject to another assignment thereof made, for the purpose of securing the payment of the sum of 100*l.*, and interest for the same at the rate of 5*l.* per cent. per annum, to *T. Browne* and *W. Ubby*) and all interest which shall become due and payable on such part or share, mentioned and intended to be hereby assigned from the time of the decease of her the said *Ann Perry*," upon trust, to repay himself, the said *W. E.*, the sum advanced, and upon certain other trusts, as to the surplus. The deed then contained a covenant to repay the money by instalments, as stated in the declaration.

E. Lawes,

1829
 How
 signed
 PARKER

1819.

Non
assumpsit
Pleaded

E. Lawes, in support of the demurrer. The first objection is to the manner in which the assignment is stated in the declaration. The deed is in effect an assignment of stock, although it purports to be an assignment of money, for a subsequent part of it shews, that all the money had been then invested in the public funds. Now stock and money are different things: *Jones v. Brindley* (a); and, therefore, the declaration should have described this as an assignment of stock, that being the legal effect of it, whereas it describes it as an assignment of a share in "the sum of 2000*l*." The deed itself shews, that no money remained uninvested at the time when it was executed; the effect of it is, therefore, inaccurately stated in the declaration, and the defendant having set out the whole deed on oyer, may take the same advantage of a variance on demurrer, as he might had he pleaded non est factum. *Smith v. Yeomans*. (b) [*Holroyd J.* Where you state, that, by a certain deed, "it is witnessed, &c.," there can be no variance, if the very words of the deed are set out, which has been done in this case.] In *Swallow v. Beaumont* (c), the words "it is witnessed" were introduced, yet it was held that there was a fatal variance. Then, secondly, the declaration describes this as a legal assignment of the money, whereas there could be nothing more than an equitable assignment in reversion, the stock being in the names of trustees, and having been previously assigned to other persons, and the share of the plaintiff's wife being subject to the claim of *Ann Perry* during her life. *Vansandau v. Burt*. (d)

(a) 1 *East*, 1.(c) 2 *B. & A.* 765.(b) 1 *Saund.* 317.(d) 5 *B. & A.* 43.

Tindal, contra, was stopped by the Court.

1833.

ROSS
against
PARKER.

Per Curiam. The part of the deed upon which this objection is founded is quite immaterial to the present action; and, therefore, supposing that there was a variance between the deed, as described in the declaration, and as set out on oyer, still it would be no ground of demurrer. But here there is no variance which would be available even on a plea of non est factum. The declaration does not affect to state the legal effect of the deed; it merely states, that, by a certain indenture, "it is witnessed," &c., and then sets out a covenant, and a breach of it, for which the action is brought. If it had been stated as a fact, that the parties assigned money, and the deed shewed that they assigned stock, there might, on a plea of non est factum, have been some ground for the objection. It is true, that the declaration in *Swallow v. Beaumont* contained the words "it is witnessed;" but there non est factum was pleaded; and, upon the deed being produced in evidence, it appeared that the declaration which affected to state the consideration according to the deed stated it imperfectly; there is not, therefore, any resemblance between that case and the present; and our judgment must be for the plaintiff.

Judgment for the plaintiff: (a)

(a) The ground upon which a party may set out a deed on oyer, and demur, is explained in *Sacheverell v. Froggitt*, 2 Wms. Saund. 366. a. n. (1). See also *Com. Dig. Pleader*, (Q 3.) and (2 V 3.)

1823.

CLAY and Others, Administrators de bonis non,
with the Will of T. CALVERT annexed, *against*
R. WILLIS, surviving Executor of J. PARKINSON.

A. mortgaged lands in fee to *B.* and *Co.*, with a power of sale upon trust to repay themselves the monies advanced, &c., and to pay over the surplus to *A.*, his executors or administrators. Before any sale was made, *A.* died, having devised all his real and personal property to *C.* and *D.* (whom he also made executors,) upon trust to sell and pay debts, &c. During the lifetime of *C.* and *D.*, *B.* and *Co.* sold the estate, and paid the surplus into the hands of *E.*, who was agent for *C.* and *D.* Whilst the money remained in *E.*'s hands, *C.* and *D.* died. *E.* also died soon after, leaving the defendant his executor. The plaintiffs having taken out administration de bonis non, with the will of *A.* annexed, brought an action for money had and received against the defendant: Held, that it could not be maintained; for that the money in the defendant's hands was equitable, and not legal assets, and therefore would not have been recoverable by *C.* and *D.* in their representative character.

Held, also, that a promise made by the defendant to pay the money to the plaintiffs was merely nudum pactum, they not being entitled to receive it.

ASSUMPSIT for money had and received by defendant's testator, to the use of *N. Calvert* and *R. Bond*, as executors of *T. Calvert*, which defendant, as surviving executor, after the death of *T. Calvert* and *R. Bond*, promised to pay to plaintiffs, as administrators de bonis non. The declaration also contained a count for interest. Plea, non-assumpsit. The cause was tried at the Summer assizes for Lancaster, 1821, before *Holroyd J.*, when a verdict was found for the plaintiffs for 1000*l.*, subject to a reference, as to the amount of interest, and subject to the opinion of this Court, upon a case, in substance as follows.

By indentures of lease and release, dated the 8th and 9th April, 1795, made between *T. Calvert* of the one part, and *T. Worswick*, *R. Worswick*, and *A. Worswick*, of the other part, the release reciting that *T. Calvert* had opened an account, and borrowed the sum of 400*l.*, at interest; and that it was agreed, as a condition of the loan, that *T. Calvert* should convey (amongst others,)

the

the premises thereafter mentioned, to secure the payment of that sum, and any further sums that might be advanced by Messrs. *Worswick*, together with commission, interest, &c. In consideration of the said sum of 400*l*., and for other considerations therein mentioned, *T. Calvert* conveyed to *T. Worswick*, *R. W.*, and *A. W.*, and their heirs and assigns, amongst others, certain freehold premises in *St. Leonard's Gate*, in *Lancaster*; to hold the same to them, their heirs, and assigns for ever. The release then gave to the *Worswicks*, their heirs, &c. full power to sell the premises, whether *T. Calvert*, his heirs, &c., were or were not a party or parties to the conveyance; and in the mean time, and until such sales, the *Worswicks*, their executors, &c., were to receive and give discharges for the rents, issues, and profits of the said premises, to the respective tenants thereof, and then to pay, apply, and dispose of the monies to be raised by the said sales, and to be received therefrom, and by the means aforesaid, in manner following; viz. in the first place, that they should pay thereout, and discharge the costs and charges of the said recited deeds, and also the costs attending such sale or sales, and of executing the trusts, &c., and after payment thereof, then that the said *Worswicks*, their executors, &c., should retain and pay themselves thereout, not only the said sum of 400*l*., with lawful interest, but also such further advances, if any, as the said *Worswicks* should make, with commission, interest, &c.; and, after payment thereof, then upon trust, that they the said *Worswicks*, their executors, &c. should pay and apply the surplus monies, if any should remain in their hands, after discharging the full of their demands against the said *T. Calvert*, to him the
said

1823.

 CLAY
against
WILLIS.

1873.

CLAY
against
WELLS.

said *T. Calvert*, his executors or administrators, or to such person or persons to whom he or they should, by any writing or writings under his or their hands, direct or appoint, the same to be paid, and to or for no other use, trust, intent, or purpose whatsoever. The release also contained a declaration, that the receipts of the *Worswicks* should be sufficient discharges, and a covenant by *T. Calvert*, for payment of the principal and interest, and to execute conveyances if required. *T. Calvert* died in *October*, 1799, insolvent; and by his will, after charging all his real and personal estates with the payment of his debts, funeral and testamentary expences, gave, devised, and bequeathed all his messuages, lands, tenements, and hereditaments, real estate, leasehold, or chattel interest in estates, and his goods, personal estate, and effects, and all his estate, property, and interest therein, to his sons, *John* and *Nathaniel Calvert*, and his grandson, *R. Bond*; to hold to them, their heirs, executors, &c., for ever, or for and during all his estate and interest therein respectively, according to the nature or tenure thereof: upon trust, to sell his freehold and leasehold lands and tenements, and to convert his personal estate, merchandizes, and effects into money, and collect his debts, and apply the produce of the whole, first, in paying his expences, then his debts, and to divide the surplus as therein mentioned; and he appointed his said sons, *J. and N. Calvert*, and *R. Bond*, executors. By a codicil he revoked the appointment of *J. Calvert*, as a trustee and executor. Probate was duly granted to *N. Calvert*, power being reserved to *R. Bond* (who afterwards died abroad) to take probate also. *N. Calvert* also died abroad, leaving part of the goods of the testator unadministered, and afterwards, viz. on the

16th *January*, 1810, administration de bonis non, with the will and codicil of *T. Calvert* annexed, was granted to the present plaintiff. After *T. Calvert's* death, and during the lifetime of the executors, *N. Calvert* and *R. Bond*, the said freehold premises in *St. Leonard's Gate* were put up to sale by auction, and purchased by *W. Doubiggin*, for 1052*l.* The premises were conveyed to the purchaser by lease and release, to which *N. Calvert* and *R. Bond* were parties, described as trustees and executors, under *T. Calvert's* will. The balance of the purchase-money, after paying the *Worswicks*, &c., was 691*l.* 4*s.*, and was paid by the purchaser into the hands of *J. Parkinson*, the defendant's testator, who was an attorney at *Lancaster*, and acted on this occasion as solicitor both for the *Worswicks* and *N. Calvert* and *R. Bond*, the trustees and executors; and, after paying the expenses of the sale and his own bill, the sum of 550*l.* remained in *Parkinson's* hands. After the letters of administration granted to the plaintiffs, and after the death of the defendant's testator, *Parkinson*, and of his co-executor, several applications were made by the plaintiffs to the defendant, upon all of which the defendant admitted that 550*l.*, arising from the sale of the said premises in *St. Leonard's Gate*, was due from his testator to the estate of *T. Calvert*, on the balance of accounts, with interest, after the rate allowed by the *Lancaster* banks, from the 15th of *March*, 1803. In *May*, 1818, a memorandum was produced and read to him by the plaintiff's attorney, stating the said sum and interest to be due to the administrators of *T. Calvert*, from the said *J. Parkinson*, which defendant acknowledged to be perfectly correct, and declared that he had always said

he

1823.

 CLAY
 against
 WILLIS

1823.

 CLAY
 against
 WILLIAMS.

he would pay it. He told the plaintiff's attorney that an action was unnecessary, and that he was then going to *London*, and would pay on his return. In *July*, 1818, he said to a person who applied on behalf of the plaintiffs, that he would give a check for the amount in a fortnight after returning from *London*. Afterwards, defendant said he was advised that he could not pay the money safely without an indemnity, and, prior to these promises, the defendant had said he would pay if he could with safety, but never denied that the sum of 550*l.*, arising from the sale of the said freehold premises, was in his hands, as *Parkinson's* executor; and on one occasion he offered to pay it over, on having a bill filed and a decree, or on receiving an indemnity from the present plaintiffs.

Parke, for the plaintiffs. This action was rightly brought by the administrators de bonis non. It is true, the money sought to be recovered was the proceeds of what had been the testator's real estate in his lifetime; but he had conveyed that away to trustees, who had power to sell without his concurrence, and who were to hold the surplus (after reimbursing themselves) in the nature of personal property, the trust being to pay it over to the testator, his executors, or administrators. He might, indeed, have an equitable right to have back the estate, upon tendering the money due to the *Worswicks*, but not having done that, he had a legal right to the surplus whenever a sale should be made, which survived to his executors in their representative capacity; and if the executors might have sued as such for this money, the administrators de bonis non are also entitled to succeed.

succeed. *Hirst v. Smith* (a), *Cowell v. Watts* (b), *Powley v. Newton* (c) *Partridge v. Court* (d), *Catherwood v. Chabaud* (e) [*Bayley J.* If a man devises his estate to executors to sell, are the proceeds legal or equitable assets?] There are several authorities for saying that they are legal. *Girling v. Lee* (f), *Greaves v Powell*. (g) In *King v. Ballett* (h) the money produced by the sale of a trust term was held legal assets, and that is a strong case, for such an interest in land is not made assets by the statute of frauds, and, therefore, there was no remedy at law for the recovery of the term. So here, although the testator's interest in the testator's estate in question could not be claimed by the executors, yet, when the estate was sold, they were entitled to the surplus; and an anonymous case in *Vernon* (i) and *Burwell v. Corrant* (k), are authorities for saying, that these were legal assets. Here the trust was at all events at an end, as soon as the money was paid into *Parkinson's* hands; the proper remedy, therefore, is not by bill in equity, but by this action for money had and received. It must be admitted, that in *Silk v. Prime* (l) it is laid down, that assets are legal only where the executor has a naked power of sale; and, therefore, if the legal estate had been in the testator at the time of his death, and he had devised it to trustees, not giving them a naked power of sale, the proceeds would have been equitable assets. But here the question is, whether *N. Calvert* and *Bond* took as devisees or executors. The testator mani-

1823.

CLAY
against
WILLIS.

(a) 7 T. R. 182.

(b) 6 East, 405.

(c) 2 Marsh, 147.

(d) 5 Price, 412.

(e) Ante, 150.

(f) 1 Vern. 63.

(g) 2 Vern. 248.

(h) 2 Vern. 248.

(i) 2 Vern. 405.

(k) Hard. 405. Vin. Abr. Exec. (C. s. 5.)

(l) 1 Bro. Ch. Ca. 140.

1823.

 CLAY
 against
 WILLIS.

festly intended to make this money legal assets in their hands, for the *Worswicks* were to pay it over to him, his executors or administrators. Had the executors re-deemed, that might have varied the case; but they did not do so, and were therefore entitled to treat the surplus as a money fund vested in them in their representative capacity.

Armstrong, contra. It appears, manifestly, upon the face of the indentures of 8th and 9th April, 1795, that the testator's estate was conveyed to the *Worswicks*, as a security for money lent; and, therefore, although those deeds purported to be an absolute conveyance, yet in truth they only constituted a mortgage. This principle has been recognised in a variety of cases. *Bowen v. Edwards* (a) was a stronger case; there the loan did not appear upon the face of the deed, yet, upon proof that the defendant's father had filed a bill to have the lands or the money, it was held to be a mortgage. So also in *Cripps v. Jee* (b), evidence dehors the deed was admitted to prove the loan, and that being done, the conveyance of the land was held to be a mortgage. In *Howard v. Harris* (c), a covenant to repay the money was held sufficient to shew, that the transaction was really a mortgage; and there are many other cases to the same effect which it is unnecessary to cite. It appears, then, that the money sought to be recovered in this action was a part of the proceeds of the testator's real estate, sold after his death; and unless it can be shewn, that *N. Calvert* and *Bond* could, in their character of executors, have sued the trustee, this action must fail. (He was then stopped by the Court.)

(a) 1 Ch. Rep. 222.

(b) 4 Dr. Ch. Ca. 472.

(c) 1 Vern. 190.

BAYLEY J. I feel no difficulty in deciding the present question. The defendant ought not certainly to keep the money; it should go to *Thomas Calvert's* creditors, but it must be distributed according to law. If it be legal assets, the administrators *de bonis non* will be entitled to receive the money, and must dispose of it in a course of administration amongst the creditors according to the degrees of their claims; if it be equitable assets, all the creditors will share *pari passu*. The deed of 1795 is clearly in the nature of a mortgage; it recites a loan of money to *T. Calvert*, and contains a covenant by him for the repayment of the principal and interest besides the power of sale; which power of sale was, first, for repayment of the mortgage money, and then the surplus was to be paid to *T. Calvert*, his executors or administrators, or such person as he or they should appoint. No sale took place in the lifetime of the testator, *T. Calvert*; he had, therefore, at the time of his death, an equity of redemption, which, if he had died intestate, would have descended to his heir, to his own use, if there were no charge upon it, but if there were a charge, then he would be a trustee, and the equity of redemption would be equitable assets in his hands. But the testator did dispose of it as follows: he devises "all his messuages, lands, tenements, hereditaments, real estate, &c. to his sons *J. and N. Calvert*, and his grandson *R. Bond*, to hold to them, their heirs, executors, administrators, and assigns for ever upon trust to sell;" and then he makes *J. and N. Calvert* and *R. Bond* his executors. By a codicil, the appointment of *J. Calvert* was afterwards revoked. The two characters of trustees and executors are therefore united in the same persons, but this devise to them was in the former character. The

1823.

 CLAY
 against
 WILLIAMS.

1823.

 CLAY
 against
 WILLIS.

property in question was an equity of redemption, and was sold in the lifetime of the trustees, and the proceeds were received by an agent, and must have been received for them in the character of trustees. The money then became equitable assets for two reasons; first, because the subject-matter of the devise was equitable property at the death of the testator; and, secondly, because this was a devise in trust to pay debts. As to the first reason in the case of the creditors of *Sir Charles Cox* (a), it was held that the equity of redemption of a term was equitable assets, and the same point was afterwards ruled in *Hartwell v. Chitters*. (b) The subject-matter of this devise must therefore be equitable assets for the same reason. As to the second ground, *Lewis v. Okeley* (c) is precisely in point. That was followed by *Silk v. Prime* (d), (in which all the cases were fully considered) and *Newton v. Bennet* (e) to the same effect, and those cases have since been confirmed by Lord Chancellor Eldon, in *Bailey v. Ekins* (f) and *Shiphard v. Ledwidge* (g), in which he said that it made no difference whether the descent were broken or not, i. e. whether the lands were devised to trustees to sell, or descended to the heir charged with the debts. There certainly are some old cases (h) in which it is said, that if land be devised to trustees for payment of debts, and the same persons are made executors, the assets will be legal; but the cases which I have mentioned, and all the modern

(a) 3 Peere W. 341.

(b) *Ambler*, 508.

(c) 2 Atkyns, 50.

(d) 1 Br. Ch. Ca. 138. in notes.

(e) 1 Br. Ch. Ca. 134.

(f) 7 Ves. 319.

(g) 8 Ves. 28.

(h) See several such cases collected in note to *Silk v. Prime*, 1 Br. Ch. Cas., Eden's edit.

decisions are the other way. Upon this series of cases I am of opinion, that for both the reasons before mentioned, the money sought to be recovered in this action was equitable assets. The promise which the defendant is stated to have made does not vary the case, for it was merely nudum pactum, being made to a person not entitled to receive it; for, if the money had been paid to him and administered as legal assets, the defendant might again be called upon to pay it. For these reasons, I am of opinion, that judgment of nonsuit must be entered.

1823.

 CLAY
 against
 WILLIAMS.

HOLROYD J. I am of opinion that this action is not maintainable. The promise said to have been made by the defendant does not vary the case, for that was merely nudum pactum. The deed of 1795 was a mortgage with a power of sale. If that power had been executed in the lifetime of the mortgagor, the surplus would have gone to his personal representative. But that not being done independently of the will, the equity of redemption would have descended to the heir at law, and he might, by paying off the mortgage, have regained the legal estate. If he did not effect that, but suffered a sale to be made by the mortgagee, he would have been entitled to the surplus. The circumstance of there being a devise in trust to sell, has not the effect of making the proceeds legal assets. Whatever may have been ruled in the old cases in *Vernon*, it is now clearly settled, that a devise to trustees also made executors in trust to sell, does not constitute legal assets, according to *Lewin v. Okeley*, *Silk v. Prime*, *Newton v. Bennett*, *Barton v. Boucher*, reported in a note to the

1823.

CLAY
against
WILLIS.

last mentioned case, and *Batson v. Lindegreen*. (a) Those cases fully establish, that assets under the circumstances of this case are equitable, not legal. The plaintiffs, therefore, are not entitled to receive them, in whosoever hands they may be.

BEST J. This case has been already so fully discussed, that I feel it almost unnecessary to add a single word. It is clear from the cases which have been referred to, that these are equitable assets. The plaintiffs, therefore, are not the persons to receive or dispose of the money, and if they were, still this would not be the proper mode of recovering it. Several appropriate cases have been cited to shew that this is a mortgage. At the death of the mortgagor, the property in him was merely an equitable interest; the heir might, indeed, have recovered the legal interest, but the property was sold, and the proceeds must follow the nature of that whence they came. But the words of the will are by themselves sufficient to decide this question. A trust is plainly created, and the trustees were the persons to dispose of the money, and when a trust is once created, a claim by any other person can only be enforced in equity. The plaintiffs, therefore, have not established any right to interfere at all with the money, which was the subject-matter of this action.

Judgment of nonsuit.

(a) 2 Br. Ch. Ca. 94.

The KING *against* The Inhabitants of FERRY-
BRIDGE.

UPON an appeal of *R. R. Milnes, Esq.*, against a rate or assessment made for the relief of the poor of the township of *Ferrybridge*, in the West Riding of *Yorkshire*, the sessions ordered the rate to be amended by striking out a portion of the rate assessed upon the appellant, amounting to 16*l.* 16*s.* 10*d.*, in respect of his woods and plantations, subject to the opinion of this Court on the following case :

The appellant is the occupier of 650 acres of land in *Ferrybridge*. It appeared in evidence, that in the years 1785 and 1786, 340 acres of the said land were planted with oak and ash closely intermixed with *Scotch* firs and larches. At different periods, portions of the firs and larches were cut down for the purpose of thinning the plantations, and some of these thinnings were sold under the name of fir and larch poles, but the greater part were used in the erection of buildings. Considerable thinnings of the firs and larches have been made within the last four years, and produced a profit ; many of them were of the height of from 30 to 40 feet, and contain from 10 to 12 cubic feet of wood, and were 30 years old. This wood is cut without reference to size, in order to allow room for the ashes and oaks to spread. The purpose of introducing firs and larches into those plantations, being to keep the same thick and sheltered, and to make a profit by cutting the firs and larches from time to time, when the oaks and ashes by

Firs and larches planted with oaks for the purpose of sheltering the latter, and cut from time to time, as the oaks grew larger and required more space, but when once cut, not growing again, and some of them yielding a profit by sale, are not saleable underwoods within the 43 *Eds.*, the primary object of planting them being to protect the oaks, and not to derive a profit from them per se by sale. *Seemle.* That they are not underwood at all.

1823.

**The King
against
The Inhabit-
ants of
FRANTERIDGE.**

reason of their growth require more space. Fifteen years ago, 18 other acres of the said land were planted in a like manner; and five years ago, 17 other acres of the said land were also planted in a like manner. The 18 acres have been thinned by cutting out a portion of the firs and larches, but no profit was derived by such thinning. The 17 acres have not yet been thinned. The roots or boles of the firs and larches which are cut, die in the ground and produce no shoots. The whole of the land so planted hath been always rated to the relief of the poor.

E. Alderson, (and *Bland* was with him,) in support of the order of sessions. The firs and larches mentioned in this case are not saleable underwood within the meaning of the statute of *Elizabeth*. In *Rex v. The Inhabitants of Mirfield* (a), saleable underwoods are thus defined, viz. such as are intended or destined for sale, in contradistinction to such as are to supply the land with estovers for fuel and other purposes of the estate. Sale, therefore, must be the primary object of planting them. Now, here the primary object was not to derive a profit by sale, but in order to serve as a protection to the young oaks and ashes. They were planted for the express purpose of bringing forward those trees which were afterwards to become timber. Nor were they managed as underwood, which, according to *Aubrey v. Fisher* (b), is another criterion by which the Court may be guided. For it appears that they were cut, not with reference to the state of their own growth, but to that of the other trees, and in order to

(a) 10 East, 219.

(b) 10 East, 446.

give them additional room when necessary. If, however, they had been managed as saleable underwood, and with a view to profit, those cuttings would have taken place at stated periods, and standard trees would have been left at certain distances. This seems to have been founded on the statute 35 *H. 8. c. 17.*, made perpetual by the 13 *Eliz. c. 25.*, which prescribes the manner in which coppice woods or underwoods should be managed. And throughout that act, the legislature is particularly careful as to the preservation of the springs from which the underwood is to be renewed. It should seem, therefore, to follow, that when they speak of underwoods, they have reference to wood of a renewable nature. And this is confirmed by observing the other subjects of rate in the 43 *Elizabeth*, which are all of a nature producing a certain annual profit. [*Bayley J.* Coal mines are included.] That may, perhaps be, if strictly considered, an exception and the only one to the observation. Yet coal mines are the only mines which, when once opened, continue to produce a profit nearly certain and annual, and exposed to little risk and hazard, which has been assigned in the books as one of the reasons why they were made subject to the rate. Now, these trees produce no certain or annual profit. They are cut down at uncertain and varying periods, according as the growth of the oaks and ashes is more or less luxuriant. This raises another difficulty. In what mode are they to be rated? According to *Rea v. Mirfield*, saleable underwoods are rateable annually, and not in the year when cut. That may be possible where the periods of cutting are definite and certain; but if, as here, they be indefinite and uncertain, how will it be possible to ascertain the quantum of the rate. (He was then stopped by the Court.)

1823.

The King
against
The Inhabit-
ants of
Pennybridge.

Milner,

1828.

The King
against
The Inhabit-
ants of
Pennywain.

Milner, contra. These firs and larches are saleable underwood within the statute of *Elizabeth*. That statute ought to be construed so as to make as much property as possible rateable to the relief of the poor. Firs and larches are clearly not timber, and if not, they must be underwood; for that term is synonymous with *silva cœdua*. The statute 45 *Ed. 3. c. 3.* recites, that "at the complaint of the great men and commons, shewing by their petition, that whereas they sell their great wood of the age of 20 years, 30 years, 40 years, or of greater age, to merchants to their own profit, and in aid of the king in his wars; parsons and vicars of holy church emplead and draw the said merchants in the Spiritual Court for the tithes of the said wood, in the name of these words called "*silva cœdua*," whereby they cannot sell their woods, to their great damage, &c;" and then enacts, "that a prohibition shall be granted as to *gros bois*. (a) Lord *Coke*, 2 *Inst.* 643., says, that before the statute tithes were claimed of *subbois*, under the name of *silva cœdua*, but not of *hautbois*, or great wood; and states, that the word *grosse bois* signifies, specially such wood as hath been, or is either by the common law or the custom of the country, timber; for the act extendeth not to other woods that have not been, or will not serve for timber, though they be of the greatness or bigness of timber. It appears, therefore, that all wood which is not timber, either by the common law or by the custom of the country, is titheable, and comes, therefore, under the description of *silva cœdua*, or underwood. Now, by the common law, oak, ash, and elm, only are timber. By the custom of particular places, other trees, such as

(a) See the note to this statute, 1 *Gwillim*, p. 5.

beech,

beech, aspin, and horse-chesnut, are also timber. If tithes be claimed of any of these latter trees, it is a question of fact whether they be timber by the custom of the country. *Walton v. Tryon*. (a) It is not the use it is put to that makes it timber or not timber, *Rex v. Minchinhampton*. (b) In *Goodall v. Perkins* (c), Alder polls, though of trees above 20 years standing, were held not to be timber, but titheable; and in *Turner v. Smith* (d), stub oak and ash, above 30 years old, which were not accounted timber in the county of *Esser*, were held to be titheable. It is observable, that in *Aubrey v. Fither* (e), *Grose J.* only speaks of saleable underwood and timber. In *Chambers's Cyclopædia* and *Jacob's Law Dictionary*, underwood is described to be coppice or any wood not accounted timber. The sessions have not found that these were timber by the custom of the country, and they are not timber by the common law. These were not, therefore, timber, and if so, they are underwood, and having produced a profit to the owner by sale, they must be considered saleable underwood. (f)

BAYLEY

(a) 2 *Gwill.* 827.(b) 3 *Burr.* 1308.(c) 2 *Gwill.* 543.(d) *Ibid.* 529.(e) 10 *East*, 446.

(f) The question, as to the meaning of the term underwood, has arisen incidentally in actions of waste brought by the reversioner against tenant for life or years: and in the older cases, the question of waste, or not, as to cutting of wood, seem to turn generally on the point whether the wood was or was not seasonable, that is, whether by common law or particular custom the usage was to cut it periodically. In 40 *Ed.* 3. 25. in writ of waste, plaintiff counted that waste had been committed of hazels and of oaks, and as to all (except the hazels). *Belknap*. No waste committed; and as to them, he said they were growing in a park under great oaks, and were seasonable to cut, and prayed judgment if that was to be adjudged waste. *Kirton*. We tell you, that there is a quarter of the wood in which waste is assigned, and in that quarter no oaks grow, nor any other gros bois besides hazels; and he has there committed waste, and we pray

1823.

The King
against
The Inhabit-
ants of
Kensington.

1823.

—
The King
against
The Inhabit-
ants of
FERRYBRIDGE.

BAYLEY J. The statute of the 43 *Eliz.* does not throw the charge of maintaining the poor on the occupiers of every species of property, but only on the occupiers

pray that he may be attainted of waste committed. *Belknap.* Since you do not deny that they are seasonable to cut and fell at the end of seven years, we are entitled to judgment; for waste is in that which is cut and will not grow again; but with regard to underwood, at the end of seven years it will be as good as it was at the time of cutting, and that can never be adjudged waste there, where from all time it has been seasonable to fell before the end of seven years or ten years. *Thorpe C.J.* You who have an estate for term of life cannot allege title of prescription that it is not waste. *Fischden J.* to the same effect. He has said that there were no gros trees growing in that quarter, et sil y ad, ad un quart cressant, ou certain quantity de bois, quel bois q. ce. soit, vous faites waste, si vous abat. *Winckingham J.* If underwood is seasonable before the end of nine years, tenant in dower or tenant for term of life may fell; and this was adjourned, therefore quære, &c. In 42 *Ed. 3. 6.* waste brought against a man, and it was charged that he had cut underwood from year to year, so that they could not grow to be sold. *Candish.* As to the underwood, you see that he counted that we cut the underwood when the cutting of underwood cannot be adjudged to be waste. *Belknap.* As to the underwood, from the moment he does not deny the cutting, we demand judgment, &c. *Candish.* If he had counted that we had grubbed up the underwood, then this would have been good cause to have an action, because they could not grow afterwards: but not so for merely cutting, because they will grow again. In 50 *Ed. 3. 10.* "By these words, *silva cedua*, is to be understood every manner of wood which can be cut down and will grow again. Per *Belknap C.J.* And in 7 *Hen. 6. 38.*, waste alleged in cutting down and selling certain ashes. Plea, that they were seasonable wood to cut from 10 years to 10 years, and were cut for house-bote and heybote. Replication, that they were gross of the age of nine years, and able for gross timber. Rejoinder, that they were seasonable, and cut in seasonable time for house-bote and heybote, without this, that they were gross and able for timber. And in 11 *Hen. 6. 1.*, waste alleged in cutting down oaks. Plea, that they were seasonable wood, and that all the wood growing within the wood in question, had been from all time used to be cut at the age of 20 years and within, as seasonable wood. The opinion of the whole Court was, that the defendant could not justify cutting them as seasonable wood, if he said they were of the age of 20 years, for if they are past the age of 20 years, they are no longer seasonable wood. Upon which plain-
diffe

occupiers of property of certain particular descriptions there specified, and amongst others it speaks of the occupiers of saleable underwoods. The legislature does not

1823.

The King
against
The Inhabit-
ants of
Pennybaker.

tiff replied, that they were past the age of 30 years at the time of the cutting, and defendant rejoined that they were within that age. In the course of the argument *Martin J.* said, that which is called high wood (*haut bois*) in some places, in other places is only seasonable wood and underwood, and contra, according as there is plenty of wood; for if there is great plenty of wood, great (grand) oaks of the age of 30 and under, is used to be cut as seasonable wood; but where there is a scarcity of wood, it is not the custom to cut it as seasonable wood, therefore, if it have not been used to be cut as seasonable wood, then shew it to the Court, for it may very well be seasonable wood, and oaks which are called *wrattons*, which will not be timber but fire wood, (*feuable bois*;) it is not adjudged waste in some places. A similar distinction is made by the legislature in the statute for the preservation of woods, the 35 Hen. 8. c. 17. s. 13. For *Kent, Surrey*, and *Sussex*, where wood is plentiful, are exempted from the provisions applicable to the rest of the kingdom. See also a precedent of a custom in a particular wood, to cut young oaks under the age of 30 years as seasonable wood, *Rustall's Entrées*, 698.

A man makes a feoffment in fee of a manor, to the use of himself, and his wife, and his heirs: in which manor there are underwoods usually to be cut every 21 years. And afterwards the husband suffers the wood to grow 25 years, and afterwards he dieth. The question was, whether the wife, being tenant for life, might cut that underwood. And it was mooted, *what shall be said seasonable underwood*, that a termor or tenant for life might cut? *Dyer C. J.* And all the other Justices held, that a termor or tenant for life might cut all the underwood which had been usually cut within 20 years. In 11 H. 6. 1. issue was taken if they were of the age of 20 years or not? But in the wood countries they may fell seasonable wood, which is called *silva cedua*, at 26, 28, or 30 years, by the custom of the country. And so the usage makes the law in several countries. And so it is holden in the books of 11 H. 6. and 4 Ed. 6. But they agreed, that the cutting oaks of the age of eight or ten years is waste. *Godt. 4. Pl. 6. H. 23. Et.* Another question mooted was, that at the time of the feoffment it was seasonable wood, and but of the growth of 14 or 15 years; if this suffering of the husband of it to grow 25 years during the coverture, should bind the wife so as she cannot cut the woods? By *Dyer C. J.* and all the other Justices: This permission of the husband shall bind the wife, notwithstanding the coverture, for that the time is limited

1828.

The King
against
The Inhabitants of
Framingham.

not use the word "underwoods" per se, but "saleable underwoods:" and they have not in this or in any former statute affixed any definite meaning to the term "underwood."

limited by law, which cannot be altered if it be not by the custom of the country. The wife cannot fell the wood, notwithstanding that at the time of her estate, she might, and afterwards by the permission of the husband during the coverture, the time is incurred so as she cannot fell it; because the law doth appoint a time, which if it be not felled before such time, that it shall not be felled by a termor or tenant for life, but it shall be waste. In *Foster v. Leonard*, 25 Elizabeth, Cro. El. 1. it is said, that the name gros bois is intended of such wood as serveth for building and other uses of a high nature, and not only for fuel as the nature of birch is. And of oak and elm cut down before the age of 20 years, tithes shall be paid, for until that age they are not of such value as the law requireth for the purposes aforesaid; and in *Hee v. Taylor*, Cro. El. 413., underwood was said by the Court to be a thing of inheritance and perpetuity; for after every cutting down they will grow again from the stubs. And s. c. 4. Co. 51. It is a thing of perpetuity to which custom may extend, for after every felling, the underwood grows again ex stipitibus, and, therefore, is grantable so nomine by copy of court roll without the soil, and *Moore*, 555. s. c. Co. Litt. 58. Jenk. Cent. 274. This case occurred in 37 Elizabeth, only six years before the passing of the 43 of Elizabeth. In *Pincombe v. Thomas*, 16 Jac. 1. Cro. Jac. 524., it was held that a grant of all saleable woods growing did not pass the soil. In the Countess of Cumberland's case, 8 Jac. Moore, 812. it was resolved by all the Judges, that birches, which in Yorkshire were proved to have been used, and serviceable for timber for sheep-houses, cottages, and such mean buildings, were in respect of the necessary use of them in that country, timber, and belonged to the inheritance, and could not be taken by a tenant for life; and in *Brook v. Cobb*, 10 Jac. Browlow and Gouldsb. Rep. part 2. 150. waste for cutting down oaks, it appeared upon the evidence, that the said oaks were remaining upon the land for standile, according to the statute, at the last felling of that wood, and they were of the growth of 16 or 20 years, and that tithes were paid for it. And it was agreed by the Lord Coke and the other Justices, that this was no waste, inasmuch as it was felled as *acreswood*. And it was said by the Lord Coke, that though it should be of the age of 20 or 24 years, yet if the use of the parties be to fell such for *seasonable wood*, this shall not be waste, and if tithes be paid for that; it appears that it is no timber.

"underwood." If they had done so, we should feel ourselves bound to adopt that as the meaning of the word in construing the present act. It has been said that all wood comes within the description either of timber or underwood, and therefore, that as firs and larches are not timber, they must be considered as underwood. It is not necessary to decide whether this be correct, because by the statute of *Elizabeth*, saleable underwoods only are subject to be rated to the relief of the poor. It may, however, be observed, that if all wood which is not timber, be underwood, it would follow, that horse-chesnuts, limes, plane-trees, and aspens would come within that description. Yet, surely, it would be a perversion of language to call such trees underwood. Generally speaking, that term is applied

1823.

The King
against
The Inhabitants of
Parslovidge.

It appears from these several authorities that tenant for life might cut down seasonable wood at seasonable time. That term seems to be synonymous with *sylva coedua*. It comprehends not merely coppice wood, or that species of wood which is cut periodically for firebote or heybote, or other inferior purposes; but by custom in particular countries where wood is plentiful, young trees within the age of 20 years, which, if left to grow, would be timber. The cuttings of seasonable wood constitute part of the temporary renewable profits of the land, and therefore belong to tenant for life, and not to the inheritance. Underwood (*subbois*) is a species of seasonable wood, and, from the very term, seems to denote wood growing under other wood. That it originally bore that meaning appears from the pleadings in the case cited from the *Year-book*, 40 Ed. 3. The plea was, that the hazels were growing in an enclosure, under great oaks, and were seasonable to cut. The replication, that waste was assigned in a part of the wood where there were no *gros bois*. And in *Bro. Abr.*, *Waste*, 21., this case is cited to shew that it is waste to cut hazels in a part of a wood where there are no *gros trees*. The term underwood may not have that confined meaning at the present day. One quality, however, is essential to it as well as to every species of seasonable wood, viz. that "when cut, it grows again from the stubbs;" for waste is in that which, when cut, will not grow again: so it is waste to grub up underwood. It is quite clear, therefore, that the firs and larches, in the case before the Court, were not underwood, for when once cut, they would not grow again.

1823.

The King
 against
 The Inhabit-
 ants of
 Farnham.

to a species of wood which grows expeditiously and sends up many shoots from one stool, the root remaining perfect from which the shoots are cut, and producing new shoots, and so yielding a succession of profits. It is probable that this is the description of coppice and underwood to which the statute of *Elizabeth* applies. But it is not necessary to decide that, inasmuch as that statute also requires that it should be saleable underwood, and the word *saleable* in *Rex v. Inhabitants of Mirfield* (a), has been held to denote such as is intended or destined for sale, in contradistinction to such as is to supply the land with estovers for fuel and other purposes of the estate. It does not, therefore, come within the description of saleable underwood, unless the prospect of deriving a profit by sale was the main object of the proprietor when the plantation was made. There are some species of wood, such as hazel, which are valuable only as underwood, and which must have been planted originally for the purpose of acquiring profit by sale. But of all plantations, fir is perhaps the least valuable, being chiefly, I believe, intended for protection rather than profit. It is found as a fact in this case, that these firs and larches were planted principally for the purpose of affording protection to the oak and ash. The latter were the most valuable. The firs, too, were cut only for the purpose of thinning the plantation. Some, indeed, were sold, but the greater part were used in the erection of buildings on the estate. Here, the trees when cut, were 30 feet high, which to be sure does not accord with one's notions of underwood. Nor could they have been planted with a view to a profit by sale, for if so, the cuttings would have taken place with

(a) 10 East, 219.

reference to their size; but here, the cuttings were made in fact merely for the purpose of thinning the plantations, and with reference to the main object, the encouragement of the growth of the more valuable trees. It is quite clear, therefore, that profit was not the sole or even principal object for which the firs and larches were originally planted; and if so, they are not saleable underwoods within the meaning of the 48 *Elizabeth*. It seems to me, that it would be most mischievous if property of this description was liable to be rated. It is an object of national policy to encourage the growth of timber. The grower of timber gives up a present profit with a view to future advantage, and it is fit that he should be encouraged to do so. If this be rateable property, then, according to the *King v. The Inhabitants of Mirfield (a)*, it must be rateable annually to the relief of the poor, though it should not happen to be cut more than once in 20 years. The grower, therefore, will be subject to an annual charge long before he can derive any profit. That would operate as a great discouragement to the growth of timber; and I cannot, therefore, think that the legislature meant to subject property of this description to such an annual charge. The object of the statute was, to subject to the rate all such property only as yielded a succession of profits. I am, therefore, of opinion, that whether this be underwood or not, at all events it is not saleable underwood, and therefore not rateable to the relief of the poor.

HOLROYD J. I am also of opinion that the firs and larches mentioned in this case are not saleable under-

(a) 10 *East*, 219.

1823.
The King
against
The Inhabitants
of
Mirfield.

1823.

THE CASE

of the
Firs and
Larches
planted
in the
Plantations
of the
Forest of
Windsor

woods within the meaning of those words, as used in the 43 *Elizabeth*. The word "underwood" must be there taken to be used in its popular sense, unless it be shown to have been used differently by the legislature in that or other statutes. After great research upon this subject, Mr. *Milner* has not been able to shew that it has been so used by the legislature in any other sense. According to its popular meaning it signifies coppice, as distinguished from *hautbois*. I cannot agree that all wood which is not timber comes within the description of underwood. If that were so, beech, aspin, horse-chesnut, lime, and walnut trees, would be underwood in all places where they were not timber by the custom of the country. It certainly would be contrary to the popular meaning of that term, to call such trees underwood. Admitting, however, that these firs and larches were underwood, I am clearly of opinion, that they are not *saleable* underwoods within the meaning of the statute of *Elizabeth*. The general subject of rate in that statute is property yielding renewable profits; for even coal-mines when worked may be said, in some sense, to yield a succession of profits. Underwoods cut at stated periods do yield a succession of profits from time to time, though not annually. This is clearly not wood of that description, for when it is once cut, the root is destroyed, and there is no succession of profit. In order to ascertain whether these be saleable underwoods, the object for which they were planted and the mode of management ought to be taken into consideration. It is stated in the case, that the purpose of introducing the firs and larches into the plantations was to keep the oaks and ashes thick and sheltered, and to make a profit by cutting the firs and larches from time to time, when the
oaks

oaks and ashes, by reason of their growth, required more space. The principal object, therefore, of planting the firs, was to afford protection to the more valuable trees, and though a profit from the cuttings was contemplated, yet the cuttings were to take place only when the other trees required more space. And although, in fact, some of the thinnings did yield a profit, the chief object, both of planting and cutting the firs and larches, was not to derive a profit from them *per se*, but to encourage the growth of the timber. The latter, when at maturity, was looked to as the principal source of profit. It appears that, upon one occasion, even though eighteen acres were cut, no profit whatever was thereby produced; and that is a strong circumstance to shew, that the cuttings were not made with a view to sale, but to encourage and preserve the oaks and ashes. I am, therefore, clearly of opinion, that these firs and larches are not saleable underwoods within the meaning of the statute of *Elizabeth*.

BEST J. It certainly would be very desirable, that every species of property should be rateable to the relief of the poor. The statute of *Elizabeth*, however, directs the rate to be raised by taxation of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwoods. The first four species of property mentioned in the statute yield an annual profit, and coal-mines, when worked, usually produce something like an annual profit. In the reign of *Elizabeth*, underwood was probably more generally used for fuel than at present; it yielded also a profit at certain intervals, though not annually. The legislature, too, have not merely used the term underwood, but have qualified it by the word *saleable*, thereby meaning

1828.

The King
against
The Inhabit-
ants of
Barnstaple.

that species of underwood which is generally produced for the purposes of sale, which is cut down at stated periods, produces new shoots, and thereby yields at certain intervals profits coming as nearly as possible to annual profits. It appears, in this case, that the cuttings did actually yield some profit, but they are not necessarily rateable on that account. The property ought to be of that description from which the owner is likely to derive a certain profit. Now, when this plantation was made, the owner could not reasonably expect to derive any profit from the mere cuttings of the firs and larches. The great object which he had in view was profit from the more valuable trees, of which the firs and larches were to be the shelter and protection. The latter were not to be considered objects of profit till that purpose was attained. It has been argued, that as these firs would be titheable, they are, therefore, subject to be rated to the poor; but that by no means follows; for by the stat. 45 *Edw. 3. c. 3.*, gros bois of the age of 20 years, in respect of which the clergy had claimed tithe, under the name of *sylva cædua*, is expressly exempted from tithe. Now, gros bois means timber, and by the common law, includes oak, ash, and elm, and by the custom of the country, in particular places, many other species of trees. Every species of wood which is not timber by the common law or by custom, is titheable. By the statute of *Elizabeth* no species of wood but saleable underwood is liable to be rated to the relief of the poor. It has been said that *sylva cædua* and underwood are synonymous. In *Ford v. Rackstor* (a), however, Lord *Ellenborough*, delivering the judgment of the Court, says, “*Sylva cædua* and sub-

(a) 4 *M. & S.* 137.

bois, or underwood, are not, it should seem, from stat. 45 *Edw. 3.*, synonymous; for subbois is stated to be comprehended in it, not to be it itself, or to be the same thing with it. *Sylva cædua* seems to comprehend *vi termini* besides underwood, all such wood as is occasionally cut, either in body, branch, or root, with the statutable exception only of *gros bois*, properly so called, when it is of that age at which it is, by the stat. 45 *Edw. 3.*, exempt from being tithed, i. e. of twenty years or upwards." Underwood, therefore, is one species of *sylva cædua*; and, possibly, the firs and larches may be *sylva cædua*, though not underwood. It is, however, unnecessary to decide in this case, whether these firs be underwood or not. It is sufficient to say, that they are not saleable underwoods, and, therefore, that they are not rateable to the relief of the poor.

Order of sessions confirmed.

the King v. Mayor &c of York & ad ill &c

REX against The Mayor, Aldermen, and Burgesses of SUDBURY.

UPON an appeal by the mayor, aldermen, and capital burgesses of the borough of *Sudbury*, against the poor-rate of *Ballington* in *Essex*, on the ground that they were rated for property which they did not occupy, the sessions confirmed the rate, subject to the opinion of this Court, on the following case :

Where a corporation, consisting of a mayor, aldermen, and twenty-four capital burgesses, was seized in fee of certain pasture lands, and appointed a ranger to keep the

keys of the gates, clean the ditches, preserve the fences, and impound cattle trespassing thereon; and, at a court held annually, made such regulations concerning their pastures, and the number of cattle each burgess was to turn on, and the sum to be paid in respect thereof, which money, after deducting the expences of management of the land, was distributed among the burgesses who did not turn on: Held, that the corporation were liable to be rated to the poor, as the beneficial occupiers of these pastures.

DUTY OF
 THE
 TO THE
 THE
 THE
 THE

Richard De Clare, about the year 1260, granted certain pasture land, called *Portman's Croft*, in the hamlet of *Ballingdon*, to "his burgesses and whole commonalty of *Sudbury*;" and *Charles the Second*, by his charter, under which the corporation now exists, confirmed the said grant to the mayor, aldermen, and burgesses. This land is inclosed, and the corporation, consisting of a mayor, six aldermen, and 24 capital burgesses, appoint and have always, within the time of living memory, appointed, a person who is called the ranger of the commons, to keep the keys of the gates, clean the ditches, preserve the fences, impound cattle trespassing, and do other acts of a similar description. They have, during all that time, at a court called a Court of Orders and Decrees, annually made such regulations concerning their commons, as they thought proper, and given a public notice of them by the common crier; and for the year when the rate in question was imposed, the order declared, that every burgess who had a right to turn on his cattle to feed on the commons, should put two head of cattle, and no more, on *Portman's croft*. It then proceeded to appoint the day when the cattle should be turned on, and to fix the price for each head of cattle, which price is always paid by the freemen exercising this right (who amount to more than 100) to the treasurer of the corporation. The mayor, aldermen, and capital burgesses (being resident) enjoy the same right upon the same terms, and some of them exercised it during the year for which the rate was made. The cattle are branded by the ranger when turned on. The whole of the money thus paid to the treasurer, after deducting the expenses incident to the management of the land, is distributed among the poorer burgesses,

who

who have, but do not, on account of their poverty, exercise a right of depasturing cattle. The mayor, aldermen, and capital burgesses, were rated, in their corporate capacity, as the occupiers of *Portman's* croft; and the questions for the opinion of this Court were, whether there was any rateable occupation of *Portman's* croft; and if there were, whether the corporation, or the individuals who depastured their cattle upon it, were liable to be rated?

Walford (with whom was *Brodrick*) in support of the order of sessions, after citing *Rex v. The Trustees for the Burgesses of Tewkesbury* (a), was stopped by the Court.

Knax, contra. The lands in respect of which the rate was imposed, are the soil and freehold of the corporation, and the whole of the corporation have the beneficial occupation of them. *Rex v. Watson* (b) is a direct authority upon this subject. The only distinction between the two cases is, that here the corporation appoints a ranger, who performs a variety of services, all of them of an onerous nature, only as respects the corporation, such as cleaning the ditches, &c., but beneficial to the individuals in the occupation of the land. The ranger, though appointed and paid by the corporation, is the servant of the individuals who stock, and perhaps in strictness, he may be said to be paid by them, as the price of depasturing the cattle is regulated by the expenses of the corporation, of which his charges and salary must form a part. The case of

(a) 13 *East*, 155.

(b) 5 *East*, 480.

1823
1881
The King
vs. The
Trustees of
the Corporation
of Tewkesbury

1823.

The King
against
The Trustees of
Tewkesbury

Rex v. The Trustees of Tewkesbury is perfectly consistent with the decision in *Rex v. Watson*. Lord *Ellenborough*, in delivering his judgment in the former case, states, that "the trustees of *Tewkesbury* were not bound, as in *Rex v. Watson*, not to take in the cattle of strangers, but might contract with any persons, by the year, month, or week." They were merely agisters of cattle; a very common mode of occupying land. Here, the owners of the cattle, as a matter of right, used the land, subject, indeed, to the stint that is imposed at the annual court. They are tenants in common with the corporation in respect of the fee. It cannot be argued, that an occupation by some tenants in common must be taken as the occupation of all. Those who do not actually occupy, stand in the relation of landlords to the others. To rate them, therefore, would be to rate parties not liable under the statute. Officers in corporations are frequently allowed to have the occupation of part of the corporation property. They, and not the corporation, it has been decided, must be rated for it, because the rate must be laid upon the actual beneficial occupier. In these instances it might be urged, if an occupation could be in any case implied, that, as the occupation is allowed to these officers for the general benefit of the corporation, it must be considered a virtual occupation of the corporation in their hands. But the present case is still stronger. Here is a sum actually paid by those who occupy; it is not a permissive occupation only; the sum is, to all intents and purposes, a rent for a year's beneficial occupation. It is not to be likened to the sale of an aftermath. There is no other beneficial occupation by any other parties during the year; the land is pasture, and only used for the

the purposes of grazing. It may be more convenient to rate the corporation in one sum than so many individuals, but the rate cannot be supported on the grounds of convenience only, and it is to be observed, that there were nearly as many individuals in the *Huntingdon* case to be rated as in the present. There is no difficulty in ascertaining the number of the individuals who stock, and when ascertained, what is to distinguish them from other tenants in common? It is said, the corporation alone could maintain trespass. It seems to have been the opinion of *Lawrence J.*, in *Rex v. Watson*, that the corporation of *Huntingdon* could not maintain trespass after the land had been so stinted out among certain of the burgesses.

1823/

The King's
High Sheriff
The Mayor &
Sergeants

BAYLEY J. I am of opinion that the corporation were the beneficial occupiers of the land in question, and, consequently, that the order of sessions must be confirmed. We have been pressed strongly in the course of the argument, with the case of *Rex v. Watson (a)*, but that case differs from the present in two important particulars. There the individuals who turned on had the exclusive enjoyment of the land, for the purpose of turning on their cattle. No payment was made by them to the corporation, but to those resident burgesses who had the right to stock and did not exercise it. Here it is clear, from the facts stated in the case, that the corporation retained the exclusive right to the possession of the land. They appointed a ranger, he was their servant, and paid out of their funds; his duty was to keep the keys of the gates, clean the ditches,

(a) 5 East, 480.

1838.

The King
against
The Mayor of
Somerset.

repair the fences, and impound cattle: all these acts are usually done by the occupiers of land. The commoners could not insist upon having the keys from him. If the occupation, however, was in them, they would be entitled to have the controul of the gates, and they would be bound to do the several acts in respect of their occupation, which the corporation did by their servant. The corporation received the agistment-money paid in respect of the cattle turned on the land; they therefore occupied the land as agisters of cattle. The present case appears to me to fall within the principle of the decision in *Rex v. The Trustees for the Burgesses of Teakesbury*. (a) The only difference is, that there the common was fed by the cattle of strangers, and here, by the cattle of the members of the corporation. If, however, the exclusive occupation of the land is in the corporation, the principle upon which that case was decided is applicable to the present. There, an act of parliament had vested the aftermath of a certain meadow in trustees, in trust for the burgesses and principal householders of *Teakesbury*, with power to let the same annually for the best rent, and also to let it in pastures for cattle, &c., to different persons, at such rates and subject to such regulations, as the trustees should appoint, or by writing under their hands and seals, to demise the same for a term of years; the rents and profits, after payment of all charges, to be divided by the trustees amongst the objects of the trust. The trustees having let out the aftermath in pastures, at so much per head, for horses, cattle, and sheep, were held to be the occupiers of the land, and, consequently,

(a) 15 East, 155.

rateable for the same. The trustees were there considered as taking in cattle to agist, and particular stress was laid by the Court upon the circumstance, that there was no letting of any definite portion of the aftermath. Now, in this case, no definite portion of the land is let to any one individual. The corporation do nothing more than take in cattle to agist; they do not even know, in the first instance, how many cattle will come in. For these reasons, it seems to me that this case falls within the principle of the decision in *Rex v. The Trustees for the Burgesses of Trokesbury*, and is distinguishable from *Rex v. Watson*. If it were necessary to overrule either case, I should adhere to the decision pronounced in the former case, which seems to me to furnish a more reasonable rule of construction than *Rex v. Watson*.

HOLROYD J. This case differs from *Rex v. Watson* in several particulars. In that case it did not appear that the corporation did any acts upon the land. The temporary ownership seems to have been given up to the three persons mentioned in the case. Here the right of soil is in the corporation; they have the management of the land by the ranger, their servant, who keeps the keys of the gates, and cleans the ditches; at the court mentioned in the case, they annually make regulations with respect to the mode of enjoyment of the commons by the burgesses. The money paid in respect of the cattle turned on, is received by the corporation, though it be afterwards distributed among the poorer burgesses. Many of these acts done by them could only be done in respect of their being in possession of the land. That is perfectly consistent with the exercise of subordinate rights

1828

The King
vs.
The Corporation
of Trokesbury

1825.

The King
vs.
The Mayor,
&c. of
Huntingdon.

rights by the burgesses. In respect of any injury done to the land itself, trespass would lie by the corporation, but in respect of any injury done to the right of common, the burgesses could only maintain an action on the case. In *Rex v. Watson*, the part of the common situated in the parish of *St. Mary* seems to have been in the exclusive occupation of the three persons mentioned in the case. The objection to the rate was, that those persons were not rated for certain lands in the parish of *St. Mary*, over which they had commonable rights, which said land, in the notice of appeal, was stated to be in the respective occupation of the said three persons. The case stated that the mayor, aldermen, &c. of *Huntingdon* were the owners and proprietors of large tracts of land within the borough, used as a common of pasture, and stocked by the burgesses, part of which lands, viz. those mentioned in the notice of appeal, was in the parish of *St. Mary*. Now, that part in the parish of *St. Mary* was stated in the notice of appeal to be in the occupation of three persons named in the case. Those persons appear, therefore, to have had the exclusive occupation of those lands at the time when the rate was made. During that time the corporation could not do any act upon the land; they could not maintain trespass for any injury done to the land. Here the possession is in the corporation, although there be a subordinate right in others. There was no letting of any definite part of the common to the burgesses, there was no rent reserved, but merely something paid for the agisting of the cattle. For these reasons I am of opinion, that this case differs from that of *Rex v. Watson*, and that the order of sessions must be affirmed.

BEST

BEST J. I think *Rex v. The Trustees for the Burgesses of Tewkesbury* furnishes a more just principle of construction than *Rex v. Watson*, and I should be disposed to overrule the latter case, if it were necessary to do so in the present instance. If *A.* occupies for the benefit of *B. C.* and *D.*, *A.* is to be rated. Here, the corporation are the owners as well as the actual occupiers of the common, although they occupy for the benefit of individual corporators, viz. first, for the benefit of the burgesses who put in their cattle; and, secondly, for the benefit of the poorer sort, among whom the money received is afterwards to be distributed. The burgesses are nothing like tenants in common; they have no interest whatever in the soil; it is clear that the corporation retained possession by their officer; he could not otherwise impound cattle damage feasant, that being an injury done to the occupier of the land. The corporation are even to decide how many cattle each burgess is to turn on. This shews clearly, the right of occupation to be in the corporation, although the right of turning on be in different members. It seems to me that this is not distinguishable from the case of persons taking in cattle to agist. The corporation must be considered as the owners, for it is impossible to rate any other person; for before the orders of the Court are issued, the individuals who are likely to have any interest are unknown.

Order of sessions affirmed.

1823

The King
against
The Mayor of
Tewkesbury

1821.

ONIAI

HILARY

1821

LAING *against* BARCLAY.

A. and *B.*, merchants in *London*, being applied to on behalf of *C.*, resident at *Demerara*, to give him a letter of credit for 30,000*l.* to enable him to purchase produce to load certain vessels for the port of *London*, and to accept his drafts at ninety days' sight on receiving invoice, bill of lading, and orders for insurance to the extent of certain fixed prices for various kinds of produce, wrote to *C.*, stating that they consented to make the advances required upon the terms described; and that upon receiving the documents before mentioned, and no irregularity appearing, they would

ASSUMPSIT to recover from the defendant, as surviving partner of *Gurney Barclay*, deceased, the sum of 100*l.*, paid by the plaintiff upon a certain bill of exchange for 500*l.*, drawn by the plaintiff upon the defendant and his late partner, and the damages which have accrued to the plaintiff, by reason of the refusal of the said defendant and *Gurney Barclay*, deceased, to accept and pay the full amount of the said bill of exchange, when the same became due and payable; and also the further sum of 42*l.* 1*s.* 11*d.*, the net proceeds of 55 puncheons of rum, sold by the defendant and *G. B.*, deceased, on the plaintiff's account, together with lawful interest, from the 11th day of *October*, 1820. The declaration contained several special counts, on promises to accept the said bill of exchange, and also counts for goods sold and delivered, and the money counts. The defendant pleaded the general issue, and paid into court the sum of 21*l.* 1*s.* 11*d.*, upon the count for money had and received, and also gave notice of set-off. At the trial before *Abbott C. J.*, at the *London* sittings after *Trinity* term, 1821, a verdict was found

accept his drafts at the usual date to the extent of 30,000*l.* *C.* shipped produce to the value of 800*l.* on board one vessel, and to the value of 1600*l.* on board another, and sent the necessary documents to *B.* and *C.*, and directed the surplus of the proceeds of the first cargo (after repaying the advances of *A.* and *B.*) should be paid to *D.* in *London*, and that the surplus of the second should be held by them to abide by his future advice. *C.* afterwards drew a bill upon *A.* and *B.* for 500*l.* at six months' sight, and did not specify to the account of which cargo it was to be charged. *A.* and *B.* refused to accept it, and *C.* having thereupon brought an action against them: Held, first, that *C.* was not bound to draw at ninety days, but might draw at any usual date, and that six months could not be considered unusual, the jury not having found it to be so. Secondly, that *C.* was not bound to specify to which cargo the bill was to be charged; for that, in the absence of any direction by him, *A.* and *B.* might charge it to either at their election.

for

for the plaintiff, damages 525*l.*, subject to the opinion of the Court, upon the following case:

1823.

LAING
against
BARCLAY.

The plaintiff is a merchant in the colony of *Demarara*, and the defendant is the surviving partner of *Gurney Barclay*, deceased, and the said defendant, and the said *Gurney Barclay*, until his decease, traded as merchants, in co-partnership, under the firm of *Barclay Brothers*. In the month of *September*, 1818, *George Laing*, who was a correspondent of the plaintiff, and carrying on trade in *London* on his own account, applied to *Barclay Brothers*, and requested them to give the plaintiff a letter of credit, to the extent of 30,000*l.*, to which they assented, and wrote the following letter to the plaintiff on that occasion, bearing date *London, September 3d*, 1818. "Mr. *George Laing*, of this city, has done us the favour to give us your address, and has made to us the following proposition in your behalf, viz. that we should give you a letter of credit, to the extent of 30,000*l.*, in order to enable you to purchase produce, to load for this port the *William Penn*, the *Henry*, and the *Susan*, now on their voyage to your colony. That we should accept your drafts on us at 90 days sight, on receiving invoice and bill of lading, with orders for insurance, to the extent of 90*l.* per ton for coffee, 28*l.* per ton for sugar, 1*s.* 6*d.* per gallon for rum, and 1*s.* 6*d.* per pound for cotton; and he directs, that the balance of the proceeds of the cargoes, after deducting our advances, charges, and commission, should be paid to him (*George Laing*). In reply to this proposition, we hereby consent to make the advances required upon the terms described, that is to say, at the rate of 90*l.* per ton *British*, for coffee (&c. as before), on receiving the bill of lading, filled up to our order, with the particular freight specified, and accompanied by an order

1822

Laird
agent
Barclay

order for insurance. On receiving these documents, and no irregularity appearing, we shall accept your drafts at the usual date, to the extent of 80,000*l*. The *Susan*, *Henry*, and *William Penn*, arrived at Demarara, and the plaintiff, after having received the said letter of September 3d, 1818, purchased and shipped on board the *Susan* a quantity of rum and coffee. On the 15th of January, 1819, the plaintiff wrote to Barclay Brothers, directing an insurance to be effected on colonial produce, to be shipped in the *Susan*, to the value of 800*l*.; and on the 23d of the same month, forwarded to them an invoice and the bill of lading filled up to their order, and specifying the particular freight. On the 11th of February, 1819, the plaintiff wrote again to Barclay Brothers, and directed an insurance to be effected, to the value of 1800*l*. on produce, by the ship *Henry*. On the 26th of the same month the plaintiff purchased and shipped on board the *Henry* a quantity of coffee, sugar, rum, and lancewood spars, and on the same day wrote and sent another letter to Barclay Brothers, forwarding an invoice thereof, together with a bill of lading, filled up to their order, bearing date the 26th day of February, 1819, and specifying the particular freight to be paid, and directing them to hold the proceeds, and abide by his future advice. On the 4th March, the plaintiff drew upon Barclay Brothers a bill of exchange, of which the following is a copy. "Demarara, 4th March, 1819. Six months after sight of this second of exchange (first, third, and fourth, unpaid) pay to G. Ross, or order, 500*l*. sterling value received, and charge the same to account, as advised;" and on the 10th of the same month advised them thereof by letter. On the 4th of May, 1819, the before-mentioned bill of exchange, was presented to

Barclay

Barclay Brothers for acceptance, they refused to accept it, and of such refusal informed the plaintiff by letter, dated 11th *May*, 1819, of which the following is an extract: "We have now to acknowledge the receipt of your favour of the 10th of *March*, advising your draft upon us to *G. Ross*, Esquire, for 500*l.*, which has appeared for acceptance, but as you have not explained to us on what account it was drawn, and as the adverse situation of your brother's affairs imposes the necessity of great caution in our proceedings, we have very reluctantly yielded to the propriety of giving it a refusal." The plaintiff, on receiving this letter, made provision for the bill, by shipping on board the *Alliance* 55 puncheons of rum, and indorsed and forwarded to *Barclay* Brothers the bill of lading thereof, together with an invoice, with directions to sell the same on the plaintiff's account, in order that, with the proceeds thereof, they might protect the said bill of exchange when due. On the 6th of *November*, 1819, that bill having become due and payable, was presented to *Barclay* Brothers, for payment, and upon that occasion they paid 400*l.* on account, but refused to pay the remainder. It was in consequence protested for non-payment, and ultimately the plaintiff was, in virtue of security which he had given in the colony of *Demarara*, obliged to pay the remainder with damages and charges thereupon. The net proceeds of the 55 puncheons of rum shipped on board the *Alliance* was 421*l.* 1*s.* 11*d.*; and the 400*l.* paid by *Barclay* Brothers, on account of the bill of exchange, was part of those proceeds. The case was now argued by

1823:

Ex parte
Barclay
Barclay

Brougham, for the plaintiff. Unless it can be shewn that the plaintiff neglected the terms imposed upon him

1823.

LAING
against
BARCLAY.

by the letter of credit written by *Barclay Brothers*, he is clearly entitled to recover in this action. It appears by the case, that the bills of lading, invoices, and orders for insurance were regularly sent, and the only semblance of irregularity consists in the bill having been drawn at six months sight instead of 90 days. Upon examining the letter of credit, however, it will be found that this is no irregularity, for the 90 days are mentioned in that part of it only which speaks of the proposal made by *G. Laing*; in the undertaking of the defendant and his former partner, the expression "usual date" is introduced. The plaintiff, therefore, was not bound by the letter to draw at 90 days, and *Barclay Brothers* could not sustain any injury by the extension of the time to six months. But even supposing that they had a right to refuse acceptance, they should have given notice of the ground of that refusal, and then the plaintiff might have drawn a fresh bill. Now, in their letter of the 11th of *May*, 1819, the ground assigned for the rejection of the bill, is the embarrassment of *G. Laing's* affairs; no hint was given of any irregularity on the part of the plaintiffs.

Campbell, contra. The plaintiff was irregular in two particulars; first, in not stating on what account the bill was drawn; and, secondly, in drawing at six months instead of 90 days. Three ships, mentioned in the letter of credit, were to be sent out, the *Susan*, *Henry*, and *William Penn*. The *Susan* was first laden, and the bill of lading sent to Messrs. *Barclay* on the 23d of *January*. According to the letter of credit, the goods were to be bought by the plaintiff in *Demerara*, and consigned to Messrs. *Barclay* in *London*, to reimburse themselves and pay

pay over the surplus to *G. Laing*, for whose benefit the speculation was entered into. [*Bayley* J. There is nothing to shew that it was for his benefit.] The first cargo was consigned to be disposed of according to the original agreement. But afterwards goods were sent by the *Henry*, and the plaintiff, by letter of the 26th of *February*, 1819, directed that the surplus of that cargo should go in a different course, viz. according to his future advice. On the 4th of *March*, 1819, the bill in question was drawn. Messrs. *Barclay* then had two cargoes in their hands to be disposed of in different ways; and the plaintiff not having stated upon account of which he drew, Messrs. *Barclay* knew not against which they were to charge the bill. That this is an important irregularity, appears from the difficulty which has arisen from it. *G. Laing* has become bankrupt, and his assignees claim the proceeds of the cargo by the *Susan* without allowing the amount of this bill. Drawing in this manner was therefore a plain departure from the original contract, and absolved Messrs. *Barclay* from their obligation to accept. But, secondly, there was irregularity in drawing at six months sight instead of 90 days. The expression "usual date" in the latter part of the letter of the 3d of *September*, 1818, refers to the 90 days in the former part of it; but, even if that be not so, in order to help the plaintiff, the jury should have found that six months is the usual date, and nothing of that sort appears upon the case. If, indeed, the variance could not possibly be injurious, the defendant might not be able to avail himself of this objection; but he may be prejudiced by it in several ways. Acceptances at distant days are discreditable, and may on that account be injurious to a commercial house. But another

1823.

 LAING
 against
 BARCLAY,

1825.

~~Ex parte~~
LATW
 against
BARCLAY.

injury may also arise from it, the letter written by Messrs. *Barclay* was in the nature of a guarantee for *G. Laing*, and was therefore a giving of credit to him for 90 days. Now, if the goods proved insufficient to cover the advances, as soon as the bill was paid, Messrs. *Barclay* might have sued *G. Laing*, and therefore, by drawing at six months, the plaintiff imposed upon them the necessity of giving to *G. Laing* credit for that period instead of 90 days; and if it be considered that *G. Laing* was not the principal in this transaction, still the same argument applies, for then an extended credit would be given to the plaintiff instead of his brother. In either of these ways the defendant may be injured by the irregularity of the plaintiff, and was therefore justified in refusing to accept the bill in question, and the plaintiff shewed his acquiescence in that refusal by sending other goods to provide for the bill.

Brougham, in reply, was stopped by the Court.

BAYLEY J. It seems to me quite clear, that our judgment should be for the plaintiff. This was an action against the defendant for not accepting a bill of exchange in pursuance of his contract so to do. That engagement was contained in the letter written by the defendant and his late partner, on the 3d of September, 1818, wherein they state, that a proposition had been made to them by *G. Laing* on behalf of the plaintiff, and that they consent to make the advances required upon certain terms; and that no irregularity appearing, they will accept the plaintiff's draughts at the usual date to the extent of 30,000*l*. On the 15th of January, 1819, the plaintiff transmitted to Messrs. *Barclay* an order

to insure goods by the *Susan*, value 800*l.*, and on the 30th of the same month he sent the bill of lading and invoice; on the 11th of *February*, he sent an order to insure goods by the *Henry*, value 1800*l.*, and on the 26th of that month the bill of lading and invoice of those goods. The plaintiff, therefore, complied with the conditions imposed by the letter of the 3d of *September*, 1818, as to bills of lading, invoices, and orders to insure upon goods to the value of 2600*l.* That being so, on the 4th of *March*, 1819, he draws the bill in question for 500*l.*, and the question is, whether it be such as the defendant was bound to accept. It was drawn at six months and not 90 days sight, and was directed to be charged to account as advised, without specifying to the account of which cargo it was to be charged. This bill being presented for acceptance, Messrs. *Barclay* reject it, and in a letter of the 11th of *May*, 1819, assign the following reasons, "as you have not explained to us on what account it was drawn, and as the adverse situation of your brother's affairs imposes the necessity of great caution in our proceedings, we have very reluctantly yielded to the propriety of giving it a refusal." No objection was then made to the six months sight; and the situation of *G. Laing's* affairs has not been urged to-day; the only ground, therefore, stated in that letter for rejecting the bill, and still relied upon by the defendant, is that the account whereupon it was drawn, was not specified. Now, the defendant and his late partner had at that time the bills of lading of the goods shipped on board both the *Susan* and the *Henry*, and might therefore charge the bill in question to the account of either of those cargoes at their election, or they might have written to the plaintiff for further

1823.

 LAING
 against
 BARCLAY.

1823.

LAING
against
BARCLAY.

directions. The usage of trade might perhaps make it necessary for the drawees to write and enquire, but the law certainly does not, under such circumstances, absolve them altogether from the obligation to accept. But it is urged in the second place, that the extension of the time that the bill was to run, was an irregularity, and that the defendant may now insist upon that as a defence, although it was not mentioned in the first instance. If, indeed, the original letter had said, that the bills should be drawn at 90 days and *no other date*, there might have been some weight in that argument, but unless it can be rendered quite clear that such was the understanding of the parties, the objection will not prevail. Now it appears, that 90 days was the time proposed by *G. Laing* on behalf of the plaintiff, and the defendant answers, that he will accept at the usual date. If six months had been unusual, the jury might have found it to be so. But as they have not so found it, and as the defendant himself did not at first make this objection, we are well warranted in saying that it is not an unusual date. One observation made by *Mr. Campbell* at first produced a considerable impression, viz. that the extended date might delay a suit against the plaintiff, and that, in the mean time, he might become insolvent, and in that point of view it might be injurious to the acceptors. But taking all the circumstances into consideration, it is quite manifest that *Messrs. Barclay* meant to accept the plaintiff's bills on the security of money or produce in hand, to answer the amount of them, and not upon the personal security of either the plaintiff or his brother *G. Laing*. So that it could not be injurious to the defendant to accept bills at six months instead of 90 days. Both the objections relied upon

are therefore unavailing, and the plaintiff is entitled to retain the verdict which has been found in his favour.

1823.

LAINC
against
BARCLAY.

HOLROYD and BEST Js. concurred.

Postea to the plaintiff.

Exple Buxley in re Clarke. 16th Mo. 469.

HALL against WILLIAM SMITH.

ASSUMPSIT by the bearer of ten promissory notes for 1*l*. each, against the defendant as the maker. The notes were all in the following form, and signed by the defendant. "I promise to pay the bearer on demand, 1*l*. value received. *Southampton*, the 24th day of *March*, 1818. For *W. Smith, W. P. Smith, and W. R. Taylor. W. Smith.*" The said *W. Smith, W. P. Smith, and W. R. Taylor*, were at the time of making the said notes, bankers and copartners. The defendant pleaded in abatement, that the promises were made jointly with *W. P. Smith* and *W. R. Taylor*, and not by the defendant alone, and issue thereon. At the trial before *Burrough J.*, at the last *Summer* assizes for the county of *Southampton*, a verdict was found for the plaintiff for 10*l*. damages, subject to the opinion of this Court as to the several liability of the defendant on the foregoing notes. The case was now argued by,

Where a promissory note, beginning "I promise to pay," was signed by one member of a firm for himself and his partners: Held, that the party signing was severally liable to be sued upon the note.

Selwyn, for the plaintiff. The word *I* being introduced at the commencement of this note, it must be construed as if each partner had severally signed his name. If it had been intended to create a joint

1823.

VYVYAN, against ARTHUR, Administratrix of
N. D. ARTHUR, deceased.

A. being seised in fee of a mill and of certain lands, granted a lease of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing certain suits and services; and also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill and the reversion of the demised premises to the same person: Held, that the reservation of the suit to the mill was in the nature of a rent, and that the implied covenant to render it resulting from the reddendum, was a covenant that run with the land as long as the ownership of the mill and the demised premises belonged to the same person, and consequently that the assignee of the lessor might take advantage of it.

COVENANT by the devisee of the lessor against the administratrix of the lessee. The declaration stated, that at the time of making the lease *Thomas Vyvyan* the lessor was seised in fee of the demised tenements with the appurtenances, and also of a certain mill; and being so seised, on the 24th June, 1779, by indenture demised to *N. D. Arthur*, his executors, administrators, and assigns, a close of land together with certain common of pasture in the indenture described. Habendum for 99 years, if three persons therein mentioned should so long live, yielding and paying to the lessor, his heirs and assigns, certain rents, sums of money, payments, and returns; and also doing certain suits and services in the indenture mentioned; and also doing suit to the mill of the said *Thomas*, his heirs and assigns, called *Tregamere* mill, by grinding all such corn there as should grow in or upon the close thereby demised during the term. The declaration then stated the entry of the lessee, and that the lessor being seised in fee of the reversion of the demised premises, by his will, devised the same, and also the said mill unto three persons in the will mentioned, their heirs and assigns, to the use of the plaintiff for his life; that the lessor died; and that by force of the statute made for trans-

ferring

ferring uses into possession, the plaintiff became seised of the reversion in the demised premises and of the mill for the term of his life; that the lessee died intestate during the continuance of the term; and that administration was duly granted to the defendant; and that one of the persons for whose life the lease was granted was still living. Breach, that after the plaintiff became seised of the reversion of the demised premises and of the mill, and during the lifetime of the lessee, corn grew upon the demised premises which ought to have been ground at the mill; yet the lessee in his lifetime, and the defendant since his death, did not do suit to the mill of the plaintiff, by grinding there the corn so grown upon the demised premises, but wholly neglected so to do. To this declaration there was a general demurrer.

1823.

—
VYTYAN
against
ARTHUR.

R. Pollock, in support of the demurrer. This is not a covenant which runs with the land, for it does not affect the nature, quality, or value of the thing demised. In *Spencer's case* (a) it is laid down, that if the lessee covenant for him and his assigns, to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee because it is merely collateral, and in no manner touches or concerns the thing that was demised or assigned over; and therefore, the assignee cannot be charged with it no more than any other stranger. Now, here the act required to be done, is to be done upon land of the lessor, which is no parcel of the demise. In *Bally v. Wells* (b), the lessee of tithes covenanted not to let any of the

(a) 5 Rep. 16. . . . (b) 5 Wils. 95. Wilm. Notes, 344. S. C.

1823.

—
 VERNON
 against
 ARTHUR.

farmers of the parish have any part of the tithes; and this was held to be a covenant running with the land, expressly on the ground, that the thing to be done concerned the thing demised, and tended to support and preserve the estate of tithes in kind. In *Vernon v. Smith* (a), a covenant to insure against fire premises situated within the weekly bills of mortality, was held to be a covenant which runs with the land, because, by the 14 G. 3. c. 78., the landlord was entitled to have the sum insured laid out in rebuilding the premises, and therefore, that it was equivalent to a covenant to lay out the money in rebuilding the premises. In the *Mayor of Congleton v. Pattison* (b), the lessee covenanted not to hire persons to work in the mill who were settled in other parishes without a certificate; and it was held not to be a covenant running with the land, although by possibility it might affect the value of the land by creating a greater number of the poor. In *Purfrey's case* (c) the covenant was, that the lessee of a tavern should account monthly to the lessor for the wine which he sold, and should pay unto him so much money for every ton sold; and it was the better opinion of the Court, that it was not a covenant running with the land or reversion, but was a collateral thing, and did not pass to the assignee of the lessor. This doing suit to the mill is not in the nature of rent, for rent is incident to the reversion. Now here, if the original lessor had parted with his property in the mill, the doing suit at the mill would be a service due to the owner of the mill, and not to the owner of the reversion of the demised premises.

(a) 5 Barn. & A. 1. (b) 10 East, 130. (c) Moore, 243. Godb. 120.

Gaselee, contra. The doing suit at the mill is in the nature of rent, and may have been reserved in lieu of an additional rent. It is more connected with the land than a money rent; for the produce of the land itself is to be taken to the lessor's mill, and he is to derive a profit out of it. The case from the *Year Book* of the 42 *Ed. 3.* 3. is expressly in point. That case is thus stated in *Spencer's case*. (a) "Grandfather, father, and two sons; the grandfather was seised of the manor of *D.*, whereof a chapel was parcel: a prior, with the assent of his convent, by deed covenanted for him and his successors with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, &c. The grandfather did enfeoff one of the manor in fee, who gave it the younger son and his wife in tail; and it was adjudged that the tenants in tail, as terre tenants, (for the elder brother was heir,) should have an action of covenant against the prior; for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor as it is there said. But if such covenant were made to say divine service in the chapel of *another*, there the assignee shall not have an action of covenant; for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as it is adjudged in 2 *H. 4.* 6. *b.* But there it is agreed that, if the covenant had been with the lord of the manor of *D.* and his heirs, lords of the manor of *D.* and inhabitants therein, the covenant shall be annexed to the manor, and there the terre

1823.

 VIVIAN
against
ARTHUR.
(a) 5 *Coke*, 13.

1923.

VYVYAN
against
ARTHUR.

tenant shall have action of covenant without privity of blood." (He was then stopped by the Court.)

BAYLEY J. I am of opinion that this is a covenant which runs with the land, so as to entitle the assignee of the reversion to maintain this action, which is brought against the defendant, not as assignee, but as personal representative of the lessee. An action at the suit of the assignee of the reversion is maintainable in some cases at common law; in others, under the statute of the 32 Hen. 8. I rather think that this case belongs to the former class. The lease contains a *caveatum*, and whatever services or suits are thereby reserved partake of the character of rent. Now, one of the services to be rendered to the lessor in this case is, that the lessee shall grind all the corn grown upon the demised premises at the lessor's mill. It is true that rent goes with the reversion of the land in respect of which it is reserved. But in this case, at the time of granting the lease, the lessor was seised in fee of the mill, as well as of the reversion of the premises devised; and, therefore, so long as the property in the mill and the reversion of the demised premises continued to be in the same person, the suit to the mill would continue to be a suit due to the owner of the reversion of the demised premises, and would, therefore, in that respect, be in the nature of a rent. It is by no means unusual for the owner of a mansion and estate to stipulate with his tenants that they should carry coals to his mansion, and perform other similar services, and as long as the ownership of the mansion and the estate continues in the same person, those services are in the nature of rent, to be rendered to the reversioner of the lands demised. Now here,

here, the plaintiff is the reversioner of the thing demised, and also owner of the mill. In the case cited from the 42 Ed. 3., the prior and his successors took no interest in the land, yet the covenant to slag in the chapel was held to run with the land. Here the covenantor is tenant of land to the covenantee, and the suit to be done to the mill is in respect of the land demised. It is not necessary for us to decide what the case would be if the ownership of the land demised and the mill had been severed. Here the lessor continued owner of the reversion of the demised premises and of the mill from the time of granting the lease till the time of his death, and the plaintiff, as his devisee, then became entitled to both, and now continues so. My judgment is founded entirely on the unity of title to the reversion of the land demised and to the mill.

HOLROYD J. The case cited from the *Year-books* of the 42 Edw. 3. seems to me to govern the present, and is much stronger. I think this is a covenant running with the land at common law. Here the close was leased to the lessee, his executors, administrators, and assigns, yielding the rents, and doing the suits and services therein mentioned. The suits and services are to be rendered by the lessee, his executors, administrators, and assigns, to whom the lands are leased; and this suit is to be rendered to the mill of the lessor, his heirs and assigns; so that it appears to have been the intention that the assignees of the lessor and lessee should be bound, for they are expressly named, and that suit should be done to the mill as long as it continued to be the property of the lessor, his heirs or assigns. It has been said, that the thing to be done does not affect the

1823.

 VYTTAN
 against
 ARTHUR.

1825.

VYVYAN
against
ARTHUR, A

the land. But it affects the profits of the land, and, generally speaking, they are considered the same thing as the land itself; for if the lessee in this case had had a mill of his own, he would still have been bound to grind the corn grown upon the demised premises at the lessor's mill, and the prise paid for the grinding of such corn would be in the nature of a varying rent to the lessor, and a deduction from the profits of the lessee. But it is said that as the thing required to be done by the covenant is not to be done upon the land demised, but upon other land which might or might not continue to be the land of the lessor, it does not, therefore, respect the land demised, and, consequently, that the assignee cannot take advantage of the covenant. I am of opinion, however, that inasmuch as the thing to be done is to be done at a mill which belonged to the lessor at the time of making the lease, and which has always continued to belong to the owner of the reversion of the land demised, that the covenant to be implied from the reddendum is in the nature of a covenant to render a rent, and, consequently, that it is a covenant that runs with the land. It is said, that it is not in the nature of a rent, because it will not follow the reversion, for if the property in the mill and the reversion of the demised premises became severed, the service must be rendered to the owner of the mill, and not to the owner of the reversion of the demised premises. As long, however, as the mill and the reversion of the demised premises belong to the same person, the suit to the mill is a service to be rendered to the reversioner of the demised premises; and so long, therefore, it would follow the reversion, and in that respect partake of the nature of rent. Now here, at the time of granting the lease,

the lesser was seized in fee of the land demised, and of the mill, and continued so seized of the latter, and of the reversion in the former, until his death, when his interest in both vested in the plaintiff, as devisee. From the time of granting the lease to the present time, the grinding of the corn at the mill was in the nature of a rent to the reversioner, issuing out of and rendered in respect of the demised premises. For these reasons, it appears to me that the assignee may, under the circumstances, take advantage of the covenant, and, consequently, that the plaintiff is entitled to the judgment of the Court.

1823.

—
VYLLAN
against
ARTHUR.

BART J. I am of the same opinion. Here, the reversion of the land demised, and the property in the mill, belonged to the lessor during his life, and at his death passed to his devisee, and they now continue united in him. At all times, therefore, the grinding of the corn at the mill in question was in the nature of a rent-service to the owner of the reversion of the demised premises. The general principle is, that if the performance of the covenant be beneficial to the reversioner, in respect of the lessor's demand, and to no other person, his assignee may sue upon it; but if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue. I think that the performance of the covenant in this case, in the events that have occurred, would always have been beneficial to the owner of the reversion of the demised premises, and to no other person, and, therefore, that it is a covenant which runs with the land.

Judgment for the plaintiff.

1866
LONDON
PRINTED
BY
W. B. NICHOLS

EDMEADE and Others against NEWMAN.

A. and Co. and B. and Co. respectively carried on the business of bankers at Maidstone. B. and Co. became bankrupts; and at the time of their act of bankruptcy the two banks held notes and other securities of each other to nearly the same amount. The provisional assignee of B. and Co., knowing that fact, presented and obtained payment of the notes of A. and Co., partly at their bank, and partly at the house of their agents in London, who were ignorant of the situation in which the parties stood: Held, that A. and Co. might recover the amount so received, in an action for money had and received against the provisional assignee.

ASSUMPSIT by the plaintiffs, to recover the sum of 1000*l.*, as money had and received by the defendant for their use. Plea, the general issue. At the trial, at the *London* sittings after *Michaelmas* term, in the year of our Lord 1816, before Lord *Ellenborough* C. J., the plaintiff was nonsuited, under his Lordship's direction; but in the following term a rule nisi was obtained for a new trial, and on shewing cause, the Court directed the facts to be stated, for the opinion of the Court, upon the following case. The plaintiffs, long previously to and on the 6th of *March*, 1816, carried on the business of bankers, in copartnership, at *Maidstone*, in *Kent*, under the firm of the "*Maidstone Bank*." Previously to the 17th *February*, 1816, *Edward Penfold*, *John Springet*, and *William Margesson Penfold*, carried on the business of bankers, in copartnership, at *Maidstone* aforesaid, under the style and firm of the "*Kentish Bank*;" and on the said 17th *February*, 1816, their partnership was dissolved, and notice was inserted in the *London Gazette*, and *Maidstone* paper of the 20th of that month; and the said plaintiffs were acquainted with this notice on or about the same day. From such dissolution until the 7th of *March*, 1816, the business of the *Kentish* bank was carried on under the same style of the *Kentish* bank. Messrs. *Penfold* did not issue any new notes, but continued to re-issue and receive in payment the notes which had been previously issued in the names of themselves and Mr. *Springet*.

The

The said *Maidstone* and *Kentish* banks respectively for many years previously to and also after the dissolution of the said partnership, continually until Messrs. *Penfold* stopped payment, as hereinafter mentioned, daily exchanged the checks and drafts which they held upon each other, they did not receive the balance in favour of the one bank in a payment, but if the checks and drafts held by one of the banks exceeded the amount of the checks and drafts held by the other, it was the practice of the bank from which the balance was payable to deliver to the other a memorandum of exchange, to be produced and allowed upon the next general exchange of their respective promissory notes, checks, and drafts, which they held upon each other. Such general exchange was made usually once, and if the balance was thought great, twice and three times in every week; and if, upon such general exchange, the balance in favour of either bank exceeded 100*l.*, such balance was immediately paid, either by a draft or bill on *London*, to the bank to whom the balance was due; but if the balance did not exceed 100*l.*, in that case, a memorandum of exchange was given in the same manner as upon the daily exchange of checks and drafts, to be produced and allowed upon the next general settlement. On the 6th *March*, 1816, Messrs. *Ramsbottom* and Co., the *London* agents of Messrs. *Penfold*, stopped payment, and Messrs. *Penfold* continued to pay, during the usual banking hours of that day, but did not open the bank on the following morning, or afterwards. On the evening of the 6th of *March*, Messrs. *Penfold* had verbal information of the stoppage of Messrs. *Ramsbottom*. At the close of the banking business on that day, the situation of the *Kentish* bank with the plaintiffs

CASES IN HILARY TERM

1816.
1817.

Bankruptcies.
Penfold, Springet, and Penfold.
1816.

was as follows: — The *Kentish* bank held securities, received after the 1st of *March*, to the amount of 703*l*. The plaintiffs held various securities, upon the *Kentish* bank, to the amount of 296*l*., and notes of Messrs. *Penfold, Springet, and Penfold*, to the amount of 429*l*., amounting together to 725*l*.; all which securities and notes were received by the plaintiffs after the 17th of *February*, 1816. On the 12th of *March*, 1816, Messrs. *Penfold* committed an act of bankruptcy, upon which a commission was issued against them, and they were declared bankrupts. *Springet*, however, having about a fortnight afterwards also committed an act of bankruptcy, the first commission was superseded, and another was awarded against him and Messrs. *Penfold* jointly, which was in prosecution at the time when the action was brought. The defendant having been appointed provisional assignee under that commission, went down to *Maidstone*, on the 9th of *April*, 1816, informed *R. Hazell*, the managing clerk of Messrs. *Penfold*, that he was the provisional assignee, and requested him to deliver to him (the defendant) the securities upon the plaintiffs, amounting to 703*l*.; whereupon the said *R. Hazell* informed the defendant that the plaintiffs had nearly the same amount of notes and other securities of the *Kentish* bank, but the exact amount was not stated; and *Hazell* told him that they had been set apart to be exchanged with the *Maidstone* bank, by proper persons, but they were not folded up or made into a separate parcel before the bankruptcy, though *Hazell* swore, that in his own mind, he had put them apart for the purpose of exchange. The defendant took the said notes, &c. into his own possession, and presented notes amounting to 140*l*. to the plaintiffs at *Maidstone*, who duly paid the same and others, amounting to 470*l*., at the house of Sir *P. Pole* and

IN THE 3D & 4TH YEARS OF GEORGE IV.

and Co., the *London* bankers, and agents, of the plaintiffs, who being ignorant of the circumstances, paid the same, and debited the account of the plaintiffs with the amount thereof, after which, and before the commencement of this action, the plaintiffs demanded of the defendant a return of the said money, and the defendant refusing to return the same, this action was brought. The question for the opinion of the Court is, whether the nonsuit ought to be set aside, and a new trial granted. If the Court shall be of that opinion, then the rule to be absolute for a new trial, otherwise, the rule to be discharged.

Chitty, for the plaintiffs, was stopped by the Court.

Parke, for the defendant. The form of action has been misconceived. It should have been laid in case for deceit, and not in assumpsit for money had and received; for if the defendant was not entitled to the money which he received from the plaintiffs, he must have obtained it tortiously. Lord *Ellenborough* was of that opinion, and directed a nonsuit on that ground. At all events, the plaintiffs cannot be entitled to recover in this form of action, until they have delivered up the securities which they hold against the *Kentish* bank. If they are allowed to retain them, they may, after recovering in this action, either circulate those notes, or prove them under the commission issued against *Penfold*, *Springet*, and *Penfold*. There is also a difficulty as to the amount which the plaintiffs are entitled to recover, if this action be maintainable, because, upon balancing the accounts, the plaintiffs may have one claim against *Penfold*, *Springet*, and *Penfold*, and another against *Penfold*.

CASES IN HILARY TERM

1847.
Kentish bank v. Penfold.
Penfold and Penfold; for although all the notes were received by the plaintiffs, after the dissolution of partnership between Messrs. *Penfold and Springet*, yet it is not found that they were re-issued by the *Kentish* bank after that period.

BAYLEY J. The question before the Court is not for what amount judgment is to be entered, but whether there ought to be a new trial. I think it quite clear, that the nonsuit must be set aside. At the time when the *Kentish* bank failed they had securities against the *Maidstone* bank, and vice versa. Upon the balance of all those accounts, considering the firm of the *Kentish* bank the same throughout, there was a balance of 22*l.* in favour of the *Maidstone* bank. The defendant was provisional assignee of the *Kentish* bank, and in that capacity had their rights only. Now, under the 5 G. 2. c. 30., the balance of the accounts between these two banks constituted the real debt, and, therefore, if there had been only one account on each side, no debt would have been due from the *Maidstone* to the *Kentish* bank, but from the latter to the former. That being so, the defendant obtained from the managing clerk of the *Kentish* bank the securities which they held against the *Maidstone* bank, and was at the same time informed, that the latter had a counter claim to nearly the same amount. Notwithstanding this communication, the defendant obtained payment of part of those securities from the *Maidstone* bank, and of part from Sir *P. Pole* and Co., their agents in *London*. In so doing, he certainly exceeded the rights vested in him as provisional assignee. It has been contended, that this should have been an action upon the
the

the case, and not for money had and received, or that, at all events, the plaintiffs, before they commenced their action, should have returned to the defendant the securities which they held against the *Kentish* bank. But the plaintiffs certainly were at liberty to waive the tort, and were not bound to return the securities; for the defendant was never entitled to receive the money in question, and therefore cannot, by obtaining it in the manner described in this case, be placed in a better situation than before. The balance of the accounts, and that only, was the real debt between the two banks. The defendant was bound to know that, and ought not to have obtained a larger sum by the manœuvre to which he resorted. This nonsuit must, therefore, be set aside; and if there be different claims against the *Kentish* bank before and after *Springet* quitted the concern, different accounts may be stated.

HOLROTH and BART J. concurred.

Rule absolute for a new trial.

1888.

The Liverpool
Canal Company
v.
Hustler

Company of Proprietors of the LEEDS and
LIVERPOOL Canal against JOHN HUSTLER.

A canal act directed that no boat navigating thereon of less burthen than twenty tons, or which should not have a loading of twenty tons on board, should be allowed to pass through any of the locks unless on payment of tonnage equal to a boat of twenty tons: Held, that this clause did not impose a toll upon empty boats.

ASSUMPSIT for tolls. Plea, general issue. At the trial before *Bayley J.*, at the *Lancaster* Spring assizes, 1880, a special verdict was found by the direction of the learned Judge. The facts stated in the special verdict raised the same question that was discussed in *Hollinshead v. Liverpool and Leeds Canal Company*. (a) The case was now argued by *Tindal* for the plaintiffs, and *Hollinshead* for the defendants. In addition to the arguments urged for the plaintiffs on the former occasion, it was now observed for the defendants, that if the 23 G. 3. c. 47. be so construed as to render empty boats liable to the toll, it will have the effect of creating a new toll; but, if its operation be confined to such boats as have some cargo, but less than 20 tons, it will merely enlarge a toll before imposed.

BAYLEY J. The clause in the 10 G. 3. c. 114., enacting that no boat of less burthen than 20 tons should pass any of the locks without paying tonnage equal to a boat of 20 tons, did not impose any toll upon empty boats. It was merely intended to put smaller boats upon the same footing as those of 20 tons burthen, and before that time, the latter, if empty, were not liable to toll. It was afterwards found that boats of greater burthen than 20 tons sometimes navigated with less than that

(a) 2 B. & A. 66.

quantity of cargo, by which the company were deprived of part of that benefit which the legislature intended to confer by passing the former act; and, therefore, the 23 G. 3. c. 47. put boats of greater burthen than 30 tons, but carrying less than that quantity of cargo, upon the same footing as boats of 20 tons. Still, no toll was expressly imposed upon empty boats of the latter, or any other description, and we are called upon to say, that such a toll was imposed by inference. Those who seek to impose a burthen upon the public should take care that their claim rests upon plain and unambiguous language. Here, the claim of the plaintiffs is by no means clear; I am, therefore, inclined to think, that the judgment of this Court on the former occasion was incorrect, and that the defendant is entitled to have judgment in his favour.

HOLROYD and BEST J. concurred, and said that the defendant's counsel had satisfied them that the former decision was wrong.

Judgment for the defendant. (a)

(a) This case has been thus briefly noticed, as the question is no longer of public importance; the 59 G. 3. c. 105. having imposed a simple lockage duty of 5s. upon empty boats.

405.

The LIVERPOOL
Canal Company
against
HUNTLEY.

CASES IN HILARY TERM

1882

1882
1882
1882
1882
1882

DOE on the demise of, Sir R. SUTTON, Bart.,
against P. F. HARVEY, Esq., Executor of A.
D. O'KELLY, Esq.

By act of parliament tenant for life was empowered to grant leases for any term not exceeding ninety-nine years, so as every such lease or leases be made to take effect either in possession, or immediately after the determination of the leases then subsisting thereof respectively, and so as in every such lease there be reserved, payable during the continuance of the term and estate thereby to be granted, the best and most beneficial

EJECTMENT to recover possession of five houses situate in *Half-Moon Street, Piccadilly*, in the county of *Middlesex*. At the trial before *Abbott C. J.*, at the *Westminster* sittings after *Hilary* term, 1882, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on the following case:

By an act of parliament of the 29 G. 3., entitled "An act for enabling *William Pulteney*, Esquire, to grant leases of certain estates in the county of *Middlesex* and city of *London*:" the following leasing power was given, "That it should and might be lawful to and for the said *William Pulteney*, from time to time, by indenture duly executed, &c. to lease unto any person or persons whatsoever all or any part of the said premises therein mentioned; to hold the said premises unto the persons unto whom or for whose benefit such lease should be

yearly rent or rents. Part of the estate being let upon leases which, in due course, would expire on the 10th *October*, 1791, the tenant for life, in consequence of one bargain, executed at the same time two leases of that part of the estate, one bearing date the 4th *May*, 1787, for the term of thirty years, to commence on the 10th *October*, 1791, and the other bearing date 4th *June*, 1787, for the term of sixty-three years, to commence 10th *October*, 1821: Held, that this latter lease was void, inasmuch as it was not to take effect immediately after the determination of the subsisting lease.

The first of these two leases reserved a rent of 270*l.*, the second reserved only 120*l.* By a clause in the second lease the tenant was bound to rebuild either before the expiration of the term granted by the first lease, or within the first year of the term granted by the second. *Scilicet*. That although the rents reserved by the two leases might be the most beneficial as between the lessor and lessee, yet they were not so between the tenant for life and the reversioner, and that, upon that account also, the second lease was void.

made,

made, his executors, &c. for any term or number of years, so as such term or number of years did not exceed the term or space of 99 years from the date of executing such lease; and so as every such lease or leases be made to take effect either in possession or immediately after the determination of the leases then subsisting thereof respectively; and so as that in every such lease there be reserved to be payable, during the continuance of the term and estate thereby to be granted, the best and most beneficial yearly rent or rents, to be incident to the immediate reversion of the premises, that, considering the nature of the case, can be reasonably had or obtained for the same at the time of making such lease, without taking any fine, income, premium, or foregift, for or in respect of making such demises or leases." In virtue of this power, the said *W. Pulteney*, by an indenture of lease bearing date the 29th of *May*, 1787, demised the premises in question to the said *A. D. O'Kelly*, his executors, &c.; to hold from the 10th day of *October*, 1791, for the term of 30 years, at the yearly rent of 202*l.* 10*s.* for the first year of the said term of 30 years, and at the yearly rent of 270*l.* for the residue of the term, and which, in the lease, was stated to be the best and most beneficial rent that could be reasonably had or obtained for the said thereby demised premises. At the time of granting this lease there were existing leases of the same premises, bearing date the 30th of *November*, 1730, for several terms of years, which would expire on the said 10th day of *October*, 1791. By another indenture of lease bearing date the 4th of *June*, 1787, and which was agreed for at the same time as the lease of the 4th of *May*, 1787, by the same bargain, and in pursuance of which, both leases were executed at the same time, the said *W. Pulteney* demised

1803-

Doc dem.
Served
agreed
MARWY.

1821
 But see
 1821
 1821
 1821

demised the same premises, to hold the same to said *A. D. O'Kelly*, his executors, &c. from the 10th day of *October*, 1821, for the term of 63 years, at the yearly rent of 120*l.*, which in the said lease was stated to be the best and most beneficial yearly rent, incident to the immediate reversion of the premises, that, considering the nature of the case, could be reasonably had and obtained for the same. In the lease of the 4th of *June*, 1787, is the following recital: "Whereas the messuages or tenements hereinafter demised are held by virtue of or under six several leases, five whereof being dated 30th *November*, 1780, will expire on the 10th *October*, 1791; and the other of the said leases, made to the said *A. D. O'Kelly*, bearing date the 29th day of *May*, 1787, for the remainder of a term of years, which will expire on the 10th day of *October*, 1821. And whereas the said messuages or tenements have been surveyed by *S. Repys Cockerell*, surveyor, who is of opinion, that it will be for the benefit as well of the persons entitled to the premises in reversion as of the person in possession, that on or before the expiration of the said last recited lease, the said messuages or tenements should be rebuilt." This latter lease contained a covenant to rebuild the demised messuage and premises before the expiration of the term granted by the lease of the 29th *May*, 1787, or within the first year of the term of 63 years thereby granted. The premises have not been rebuilt. The ejectment was served on the 26th of *October*, 1821. *W. Pulteney*, the lessor in the said leases granted to the said *A. D. O'Kelly*, died in the year 1820, having been in the receipt of the rents and profits of the said premises, under the lease of the 29th *May*, 1787, up to the period of his death. Sir *R. Sutton*, Baronet, the lessor

lessor of the plaintiff, is now entitled to the premises in question, in case the Court should be of opinion that the defendant is not entitled to hold them. At the time of granting the lease of the 29th *May*, 1787, if the premises had been let for an entire term of 93 years, from the 10th *October*, 1791, the annual rent of 270*l*. would have been more than a fair annual rent for the first 30 years, and the rent of 120*l*. less than a fair annual rent for the residue of a term of 93 years. At the time of granting the lease of the 29th *May*, 1787, the premises were capable of standing 30 years; but it was the opinion of the surveyor, consulted at the time of completing the bargain and executing the said two leases, that it would be necessary and proper to pull down and rebuild them at such time as specified in the lease of the 4th *June*, 1787; and the calculation of the rents in the two leases of the 29th *May*, 1787, and 4th *June*, 1787, was made upon the supposition that the premises should be pulled down and rebuilt at such a time as specified in the lease of the 4th *June*, 1787; and taking into consideration the covenant to rebuild in that lease, the rents reserved under these two leases were, taking the whole as one bargain, the best and most beneficial yearly rents that, considering the nature of the case, could be reasonably had and obtained for the said premises at the time of making the leases of the 29th *May*, 1787, and 4th *June*, 1787.

Denman, for the plaintiff. The lease dated the 4th *June*, 1787, is void, not being within the leasing power reserved by the act of parliament. At the time when the lease of the 29th *May*, 1787, was executed, there was a subsisting lease which would expire on the 10th *October*,

1791.

1801
 Dec. 4th
 1801
 1801
 1801

1825.

Doc. dem.
Sutton
against
Harvey.

1791. Now in *Winter v. Loveday* (a), Holt C. J. says, that "where mention is made of leases in reversion in a power, this shall be intended of leases to commence after a present interest in being." He afterwards says, "and when applied to a lease for years, it shall be intended of a lease which shall take effect *after the expiration or determination of a lease in being*." The first lease, therefore, was a lease in reversion, to take effect upon the determination of the subsisting lease, and an execution of the power. The second lease was not to take effect till 30 years afterwards, and, consequently, is not within the power. But, secondly, the best and most beneficial rent was not reserved; for a much larger rent was payable during the first 30 years than during the residue of the term.

Littledale. The power is, that tenant for life may make leases to take effect in possession or reversion, so as they do not exceed in duration the term of 99 years. Now it is clear, that the tenant for life might make one lease for 99 years, to commence in 1791, and if so, why not two. The object of the power was, to prevent the land from being burdened with more than one term of 99 years. In *Rovey v. Smith* (b) it was said, that where a power authorises the appointment of a fee that it might be executed at several times, that an estate for life might be appointed at one time, and the fee at another time. In *Snake v. Turton* (c), upon a special verdict it appeared, that A. R. made a conveyance to the use of himself for life, with remainders over; with a proviso, that if he made a conveyance of the premises in fee or

(a) Com. Rep. 37.

(b) 1 Vern. 64.

(c) Cro. Cir. 472.

fee tail, that it should be a revocation of the former uses. He afterwards made a lease for years, and the next day granted the reversion in fee; and it was resolved, upon special verdict, that although there was not one entire estate in fee conveyed, yet both being found, and that it was with an intent to make a fee to pass, that this was a revocation within the proviso; and in *Reade v. Nash* (a) a similar question arose, but was not decided. These are authorities to shew, that the tenant for life may at different times and by different instruments execute a power, provided he does not exceed the term limited. The tenant, during the term reserved by the second lease of 1787, was to rebuild. The expence of rebuilding was to operate as a deduction from the rent, and the jury have found that this was the best rent that could be obtained. [Bayley J. That may be so, as between the lessor and lessee, but not as between the tenant for life and reversioner.] If there be any doubt as to that, the case ought to be submitted to another jury. It is true, that different rents could not be reserved during one term granted by one deed. But here there are two terms, and during the continuance of each term one rent only is reserved.

BAYLEY J. This case admits of no doubt whatever. The power to lease, reserved to a tenant for life, is a power by which one man is enabled to dispose of the property of another, and, therefore, we ought to take care that the tenant does not exceed the power, and that he shall not do that indirectly which he cannot do directly. It is admitted, that there could not be two distinct rents

(a) 1 Leon. 147.

1838.

Dem dem.
 Servant
 against
 Master.

reserved in the same lease, and that, therefore, such a reservation as that stated in this case would not be a valid execution of the power if found in one entire lease. Now I think that concession is decisive of the present question; for the restrictions imposed upon the leasing power would be effectually evaded, if that could be done by making two successive leases at one and the same time, in consequence of the same bargain, which could not be effected by one entire lease for the whole term. In substance, they form but one lease. The power enables the tenant for life "to lease for any term or number of years, so as such term or number of years do not exceed the term or space of 99 years, from the date or time of executing such lease; and so as all and every such lease or leases be made to take effect, either in possession, or immediately after the determination of the leases then subsisting thereof respectively; and so as that, in every such lease so to be made, there be reserved, to be due and payable, during the continuance of the term thereby to be granted, the best and most beneficial yearly rents, to be incident to the immediate reversion of the premises." Now in 1787, when the entire bargain was made, and when the two leases, (which are in substance only one,) were executed, reserving two several rents, there was only one subsisting lease, the term of which expired on the 10th *October*, 1791; and if that be so, the lease which was to commence in *June*, 1821, was not a lease to take effect in possession, or immediately after the determination of the leases then subsisting. If the tenant for life might make two successive leases, he might make any other number; he might even make successive leases for every year of the term which the power enabled him to grant. Now that might be very prejudicial!

prejudicial to the reversioner, it might even make the clause of re-entry wholly inoperative. For by non-payment of rent, or breach of any of the covenants in the several leases, the lessee would only forfeit the subsisting term granted by the lease then running; and if he was turned out of possession, he might enter again under the next lease; whereas if there were but one lease, the entire term would be forfeited by any breach of the covenants. Suppose, in this case, the tenant for life had lived twenty-seven years after the first lease took effect, and then died, and that the tenant of the estate then refused to pay the high rent reserved by the first lease, the landlord might reenter; but at the expiration of three years the tenant would be entitled to have the estate again at the lower rent, reserved by the second lease. But if the clause of re-entry was in one undivided lease, by entering, the owner of the estate would become possessed of it for the entire term. I am of opinion, that the executing of successive leases under one bargain, reserving different rents, is a fraud upon the power, in a case where, if the same rents were reserved by one entire lease, that lease would be therefore void. It is not necessary to intimate an opinion, whether, if the tenant for life had honestly made a lease for one term, he might subsequently, and in consequence of a different bargain, have made another lease for a further term. Here both the leases are made in consequence of one bargain. Then as to the rent, it is said that 270*l.* would have been more than the fair annual rent for the whole period; and that the rent reserved by the second lease would be less than the fair annual rent unless the tenant were bound to rebuild. It is found as a fact that these were the most beneficial rents that could be obtained. That may be true, as between the lessor and

1836?

Demurrer of
Sumner
against
Hawes &c

1823.

—
Dox dem.
Sutton
against
Harvey.

lessee. The question is, whether they were the most beneficial to the reversioner. I think they clearly were not. If any doubt could be entertained as to that fact, I am so clearly of opinion that the lease is void on the first objection, that I cannot think it is worth while to send the case to another trial to ascertain whether this was the most beneficial rent, as between the reversioner and tenant for life. For these reasons, I think the lease of the 4th June, 1787, void, and that the lessor of the plaintiff is entitled to recover.

HOLROYD J. I am of opinion that the lessor of the plaintiff is entitled to recover, and that each of the objections is sufficient to avoid the second lease. It appears by the case that both the leases were made in consequence of one bargain, and were to commence respectively in *October*, 1791, and in the year 1821, and that the only subsisting lease was that which was to expire on the 10th *October*, 1791. Now two leases being made in consequence of one bargain, and at the same time, the one to commence at the expiration of the lease in being, and the other not to commence till a later period, it is perfectly clear that the latter lease is not a lease to take effect in possession or reversion, immediately after the term granted by the then subsisting lease. It might have been a very different question, if the two leases had been made at different times, and in consequence of separate bargains; but it seems to me quite clear, the two leases having been made in consequence of the same bargain, although the whole term comprised in both leases does not exceed the term which the tenant for life had power to grant, that the latter lease is void. The second objection is, that even if this were but one entire lease, it would not be a lease agree-
able

able to the power, because different rents are reserved. The power requires that there be reserved and payable, during the continuance of the term thereby to be granted, the best and most improved yearly rent. Considering the object of the power, it is perfectly clear that whatever rent was reserved, should be reserved during the continuance of the whole term. It is admitted, indeed, that if there had been but one lease, the two rents could not have been reserved. They could not be the most beneficial to the reversioner, because they would put him in a worse situation than the tenant for life; and if the reservation would not be good in one lease, the making of the two leases is a fraud upon the power. It seems to me, therefore, that upon both grounds, the second lease is void. As to the finding of the jury, that the rents reserved under the two leases made under one bargain were the most beneficial rents that could be obtained, that may be so, as between the person making the lease and the lessee; but in order to see whether it be so as between the tenant for life and the reversioner, we must look to the facts of the case, and the terms of the lease, independently of the opinion of the jury. Now it is perfectly clear, that, as between them, this was not the most beneficial rent. The former cannot make a bargain by which a larger rent is reserved at the first part of the term, and a less at the latter. I am, therefore, of opinion, that the lease is void, first, because it is not to take effect immediately on the determination of the subsisting lease; and, secondly, because the best and most improved rent was not reserved during the continuance of the whole term.

BEST J. I am clearly of opinion, that upon both grounds this lease is bad. It is said, that the power is

1823.

DOX dem.
SUTTON
against
HARVEY.

1823.

—
*Dox dem.
 Sutton
 against
 Harvey.*

substantially complied with if the inheritance is not fettered with more than 99 years. This power, however, requires that it should take effect immediately after the determination of the subsisting lease. Now this lease does not take effect till thirty years after the expiration of the subsisting lease; for the "subsisting lease" means that which subsists at the time of the grant of the new lease. There could be no valid lease under this power which did not commence in 1791, when the former lease expired. Even if I did not entertain a clear opinion upon that point, I do not think the case ought to go down to a second trial upon the other. It is said, that if there were no covenant to rebuild, the rent of 270*l.* would be too high during the term granted by the first lease, and too low during the term granted by the second; but that it is not too low during the second term, because the tenant, during that term, is to bear the expense of rebuilding. Now although that may be a fair mode of measuring the rent between the lessor and the lessee, it is not so as between the tenant for life and the reversioner, because thereby the reversioner will have to bear the whole expense of rebuilding; whereas if the tenant had been bound to rebuild at an earlier period, part of the expense would be borne by the tenant for life. This appears to me, therefore, a bungling contrivance to throw the burden of rebuilding upon the reversioner. On both grounds I think that this lease is void, and that the lessor of the plaintiff is entitled to recover.

Judgment for the lessor of the plaintiff.

1823.

NEWLING *against* PEARSE.

REPLEVIN for goods and chattels distrained by the defendant on the 9th of October, 1821, for corn rents claimed to be due from *Lady-day*, 1815, to *Lady-day*, 1819, under an enclosure act. At the trial before *Richards C. R.*, at the last assizes for the county of *Cambridge*, a verdict was taken for the plaintiff on the issue joined on the second plea. In that plea the defendant alleged, "that neither the said plaintiff nor *Richard Bendyshe* were, nor was either of them, in the possession and occupation of the said allotment, at any or either of the times at which the said corn rents, or any or either of them, became due and payable, in manner and form as the said defendant hath in his said cognizance and avowry respectively alleged." This distress was taken for corn rents; and the payment was refused, on the ground that during the period when the rents respectively became due, the land was not liable to the payment of corn rents, because no crop was raised upon it, and the owner had not any beneficial enjoyment of it. At the commencement of that period, *Richard Bendyshe, Esq.*, was seised in fee of the land for which the corn rents were claimed. During the period for which the corn rents were claimed, *Mr. Bendyshe* resided at distance, and the land lay barren, waste, and unoccupied. Sheep were turned on it by any one who pleased, to the amount occasionally of several hundred. *Mr. Bendyshe* did no repairs upon the land, nor had he any beneficial enjoyment of it.

An enclosure act directed, that, in lieu of tithes, a corn rent should be payable to the improprisor and vicar by the person having the possession and occupation of the lands. Part of the lands enclosed were uncultivated and untenanted for some years, during which time the owner lived on another estate. He afterwards demised them to a tenant who entered and occupied: Held, first, that the corn rents were due for the time during which the land was unproductive; and, secondly, that during that time the landlord was legally in the possession of the lands so as to be liable to the burdens imposed by the statute, and that the tenant coming in under him was liable to be distrained upon for the arrear of rent.

1823.

 NEWLING
 against
 PEARSE.

At the termination of that period, he demised the land for a term of years to the plaintiff *Newling*, who thereupon entered. Up to *Lady-day*, 1815, the land had been in the occupation of one *Southey*, as tenant to *Bendyshe*.

The act referred to in the pleadings was entitled an act for dividing and allotting the common and open fields, meadows, commonable lands, and waste grounds within the parish of *Barrington*, in the county of *Cambridge*; and enacted, that the commissioners therein mentioned should value all the common and open fields, meadows, commonable lands, and waste grounds by that act intended to be divided and allotted, and also all the enclosed lands within the said parish, which, at the time of passing that act, were liable to the payment of tithes as therein mentioned, at the rate of 4s. for every statutable acre; and from the *London Gazette*, and by such other ways and means as they should think proper, enquire and ascertain what had been the average price of good marketable wheat in the markets of *Cambridge* and *Royston*, during the term of 21 years next preceding the *Michaelmas* 1784; and should by their award, therein after directed to be made, ascertain and set forth distinctly what quantity of such wheat should in their judgment, according to such average price, be equal in value to a sum set off all the said common and open fields, meadows, commonable lands, and waste grounds, and also all the enclosed lands in the said parish liable to the payment of tithes, at the rate of 4s. for every statutable acre; and that, from and after the expiration or other sooner determination of the subsisting lease of the great or rectorial tithes, or in such other time as thereafter provided, there

there should be issuing and payable from time to time, for ever, to the master, fellows, and scholars of *Trinity College, Cambridge*, as impropriators of the said rectory, and to *T. Finch*, vicar of the vicarage of *Barrington* aforesaid, and their successors respectively, according to their rights and interests therein, out of the lands and estates of the several land owners and proprietors of estates in the said parish, (except as therein was excepted,) such yearly corn, rents or sums as should be equal in value to the quantity of wheat so to be ascertained by the said commissioners; and the said yearly corn rents or sums of money should be payable, and paid, by the person or persons who, for the time being should be in the possession or occupation of the respective lands and estates out of which the same should be issuing, to the said impropriators and vicar, and their successors for ever, at the place, and on the days therein specified; and which said several and respective corn rents should, from and after the commencement thereof, be in lieu of, and full compensation and satisfaction for, all great and small tithes arising within the said parish of *Barrington*, and which of right belonged to the said impropriators and vicar. By a subsequent clause it was enacted, "that the said impropriators and their successors should and might (demand being previously made) have and exercise such and the same powers and remedies for recovering the said yearly rent or sum of 4s. per acre, subject to such variation as before mentioned when the same or any part thereof should be in arrear, as are by law given and provided for the recovery of rent service or other rent in arrear."

1823.

 NEWLING
against
PEARSE.

1823.

NEWLING
against
PEARCE.

Rolfe, for the plaintiff. The corn rent is a rent substituted for the tithe. No tithe in kind would have been payable, the land itself having been unproductive; and, consequently, the thing compensated for having ceased, the thing substituted in its place ought to cease also. Besides, by the express terms of the act the corn rent is to be paid by the person in the possession or occupation of the lands or estates out of which the corn rents issue. Now here, during the time in respect of which the corn rent is claimed, there was not any occupier of the land. Under this statute the occupiers are liable, as they are by the general rules of law relating to moduses and composition real. The case of *Ord v. Clarke*-(a), as reported by *Anstruther* and *Gwillin*, may be cited as an authority to shew, that a modus payable by an owner of land is good. It appears, however, from the report of the same case in *Wood*-(b), that the modus was not established, but, on the contrary, that the Court decreed an account of the tithe of hay, &c., to be taken. In the late case of *Driffild v. Orwell*-(c), *Richards* C. B. expressed great doubts, whether such a modus was good. It never has been decided to be good; and, generally speaking, it is payable by the occupier only. Besides, if the present tenant is liable to be distrained upon, under the circumstances of this case, great inconvenience might follow. Suppose the land to have been unoccupied for a time, and a new tenant to enter, and to be distrained upon for the corn rent which accrued due before his tenancy commenced, yet he would be without remedy; for he cannot recover from the landlord, because the act does not make the latter liable.

(a) 4 *Gwill.* 1437.(b) 4 *Wood*, 450.(c) 6 *Price*, 329.

Robinson, contra, was stopped by the Court.

1823.

NEWLINE
against
FRANCH.

BAYLEY J. I think this is a very plain case, and that the land was liable to the payment of tithes during the time for which the distress was made. The clause in the enclosure act, by which the corn rent is substituted in lieu of tithes, is to be considered as a bargain between the owners of tithes on the one hand and the land owners on the other. It enacts, "That there shall be issuing and payable from time to time to the Impropriators and the vicar, according to their rights and interests therein, out of the several estates of the land owners in the parish, such yearly corn rents or sums as therein mentioned." The act, therefore, assumes this to be in the nature of a rent; it then proceeds to enact, "that it shall be payable by the persons who shall be in the possession or occupation of the lands or estates out of which the same shall be issuing." It then specifies the time and place of payment; and enacts, "that the said several corn rents and sums of money shall be in lieu of and in satisfaction for all tithes." And by a subsequent clause, "the impropriators are to have the same powers and remedies for recovering the said yearly rent, when the same is in arrear, as are by law given and provided for the recovery of rent service or other rent in arrear." It appears clearly, therefore, from the whole of the clause taken together, that the tithe owner was to receive a money rent in lieu of tithe. The parties may be considered, therefore, in the same situation as if the tithe owner had granted a lease of the tithes at an annual rent. In that case, it is quite clear that it would be no answer to an action for the rent, that no tithe in kind was produced, or that the land

was

1893.

—
 Newlands
 against
 PHARL.

was unoccupied. Here the rent is a substitute for the tithes, not merely *de anno in annum*, but for ever. It does not therefore follow, that because no tithe in kind was produced, that no money rent is payable. It is said that this may operate as a hardship in particular cases, where preceding tenants have omitted to pay the rent. Perhaps the tithe owner might not have any remedy by distress against an occupier not coming in under the party indebted. Here, however, the plaintiff in replevin came in under the landlord during whose occupation the arrears of rent accrued. During that time the landlord had the legal occupation, for he might have maintained trespass or ejectment against a wrong doer. I think, therefore, that even if the rent were payable only by a person in possession, that under the circumstances of the case, he must be considered to have been in possession during the time that there was no tenant. But my opinion proceeds principally upon the ground, that by the act of parliament, the corn rent is made a perpetual charge or burden upon the estate.

HOLROYD, J. I am of the same opinion. It is found as a fact that the land was unoccupied. In one sense, lands may be said to be unoccupied if the person entitled to the possession takes no means to make the land beneficial to himself. But although he did no acts of ownership, he may still have been in the legal possession and occupation of it, so as to be liable to the burden imposed by the enclosure act. By that act a corn rent became due, and there must have been a person from whom it was due; and I think it was payable whether the land was productive or not, or whether cultivated or not. Then the question is, whether the landlord was

in

in possession or not. I think that the facts stated in the case are sufficient to shew that the landlord was in possession during the time in which the rent accrued. It is stated that the land had been in possession of a tenant up to *Lady-day*, 1815, and that he then quitted it. The possession would then revert in the landlord by operation of law; but if that were not so, the landlord subsequently demised the land to the present plaintiff. If the possession was before uncertain, the very act of entry by his new tenant re-vested the possession in him by relation, from the time when the former tenant quitted. The present tenant comes in under Mr. *Bendyshe*, from whom the corn rent was due; and by the express words of the statute, the same power of distress is given in this case when the rent is in arrear as the law gives for the recovery of rent service, or other rent in arrear. Now it is perfectly clear that the lord may distrain for rent due from his tenant upon the lessee of the latter, when the land is in possession of any person claiming under the tenant. I think, therefore, that the landlord was in the possession and occupation of the land during the time the rent accrued, so as to make him liable to the burdens imposed by the act; and that the plaintiff having come in under him, the distress was legal.

1823.

 NEWLING
 against
 FRANK.

BEST J. This was in the nature of a composition for tithes under the sanction of the legislature, and was therefore payable in all events.

Judgment for the defendant.

1823.

CARTER, Assignee of the Estate and Effects of
MOSES ANIBOL, a Bankrupt, against ABBOTT
and Others.

In an action on the 9th Anne, c. 14. brought by the assignee of a bankrupt to recover money lost by the bankrupt at play, the bankrupt, who had obtained his certificate, was called as a witness to prove the loss: Held, that he was incompetent, but that his competency was restored by three releases; first, by the bankrupt to the assignee; second, by all the creditors to the bankrupt; third, by the assignee (who was not a creditor,) to the bankrupt: Held, secondly, that a year after the commission issued, it might be presumed that all the creditors had proved, and that a release signed by all those who had proved might therefore be considered as a release by all the creditors; thirdly, that such a release did not destroy the assignee's right of action.

DEBT, upon the statute 9 Anne, c. 14., intituled
"An act to prevent excessive and dissolut gaming,"
which was tried at the Westminster sittings, in October, 1822, before Abbott C. J. and a special jury, when a verdict was found for the plaintiff for the sum of 1610*l.*, subject to the opinion of the Court on the following case. The plaintiff is assignee of the estate and effects of *Moses Anibol*, a bankrupt. The commission was dated the 9th of January, 1821; the act of bankruptcy was committed in August, 1820; the bankrupt obtained his certificate 7th September, 1821. The action was brought to recover the sum of 2285*l.*, being the amount of money lost by the bankrupt to the defendant at the game of Rouge et Noir, in the month of November, 1820. To prove the loss of the money, the bankrupt was called as a witness on the part of the plaintiff; but was objected to as incompetent, upon the ground, that if the case opened by the plaintiff's counsel, and which the bankrupt was called to prove, was true, his certificate under the said commission was void, and his future effects liable to the payment of his debts: whereupon the counsel for the plaintiff produced and proved a release, dated the 15th June, 1821, by the bankrupt to the plaintiff, as assignee, of all surplus and

allowance under the said commission; and a general release was also produced, dated 23d January, 1822, and executed by the creditors who had proved under the commission, including the petitioning creditor, to the bankrupt, of all actions, causes of action, &c., which they the creditors, or any of them, then had against the said bankrupt, or his lands, tenements, goods, and chattels, or any part thereof. A third release was given in evidence, executed by the plaintiff (who was not a creditor, and therefore had not executed the second release,) to the bankrupt. After this evidence on the part of the plaintiff, it was objected, on the part of the defendant, that, notwithstanding the releases, the bankrupt was not a competent witness, and that the effect of the releases had been to destroy the plaintiff's title to sue. The Lord Chief Justice received the evidence, subject to the opinion of the Court upon this case, and a verdict was found for the plaintiff for 1610*l*. The questions for the opinion of the Court were, first, whether the bankrupt was a competent witness; secondly, whether the instruments before mentioned had destroyed the capacity of the plaintiff to sue in this action.

Wille, for the plaintiff. The bankrupt having released the surplus, and certain creditors having released the bankrupt, if there was *prima facie* evidence to raise a presumption that there were no other creditors, the bankrupt could have no interest to increase his estate, and was therefore competent. Now a whole year had elapsed between the issuing of the commission and the date of the release: the three meetings, the choice of assignees, and the signing of the certificate had all passed. It was therefore reasonable to presume that all the creditors had by that time proved, and all those who

had

1822.

CARTER
against
ABBOTT.

1833.

CARTER
against
ANON.

had proved signed the second release. The plaintiff, therefore, made out a *prima facie* case of competency of the bankrupt. The only remaining question is, whether these releases destroyed the plaintiff's right of action. It is quite clear that they did not; for they could not operate so as to arrest the progress of the commission. (He was then stopped by the Court.)

F. Pollock, contra. There was not any evidence in this case to warrant the presumption, that all the bankrupt's creditors signed the second release. All the three meetings were held within 42 days after the commission issued; and there is no evidence of any meeting for the proof of debts after the 42d day from the commission: it must, therefore, be contended, that the presumption arose at the expiration of that time. The bankrupt's clerk might have been called to show who were his creditors: his books might have given some information, but the clerk was not called, nor were the books produced; and as these media of proof were within the plaintiff's reach, he cannot be considered as having made out a sufficient case of competency without resorting to them. But, secondly, the assignee's right of action was destroyed by the three instruments in question: he had no longer any scintilla of interest in the action; the creditors had no longer any claim upon the bankrupt's estate. So that all the purposes of the trust in the assignee were answered; and that being so, the trust itself was at an end.

“*BATLER J.* Two questions have been raised in this case; first, whether the bankrupt was a competent witness; and secondly, whether the assignee's right of action was destroyed by the releases which were executed. As to the first point, the only question is, whether the

Court may presume that all the creditors executed the second release; for if they did, the bankrupt, although *prima facie* incompetent, was, by that and the other releases, made a good witness. Now it appears that the commission issued in January, 1821: several meetings were held under it, at which it was probable that the creditors would prove; and it does not appear that any creditor applied to be let in to prove between the last of these meetings and the month of October, 1822. It has been suggested, that the bankrupt's books might have been protected, or his clerk might have been called. That is true; but the question is, whether sufficient was done to make out a *prima facie* case of competency. I think there was; and the defendant's counsel might have examined the bankrupt on the *voir dire*, before he was examined in chief. Upon the second question I have no doubt. It is contended, that, by the second release, the creditors have discharged all their claims upon the bankrupt, and upon that which was his estate, that they are no longer creditors, and that the plaintiff, therefore, can have no right to the fund which he seeks to recover. The objection arises out of a false construction of that release. It releases the bankrupt from all claims against him and his lands, goods, &c., and the creditors cannot now insist upon having them; whatever may be called *his* is protected by the release, and would be liable to an execution creditor. But as soon as an assignment was made under the commission, all that was *then* the bankrupt's would go to his assignee, and is no longer the bankrupt's. The fair and true construction of the release, therefore, is, that it does not relate to things before effectually assigned, but to such things as might thereafter come to the bankrupt. For these

1822.

 CARTER
 against
 ANSWER.

1823.

Case
against
Anon.

reasons, I am of opinion that the action was maintainable, and that the bankrupt was a competent witness.

Holroyd and Best, J. concurred.

Potes to the plaintiff.

Dox on the demise of John Newby against

Jackson.

Where an agreement was made between A. and B. that the former should sell certain premises to B., if it turned out that he had a title to them, and that B. should have the possession from the date of that agreement :

Held, that an ejectment could not be maintained by A. against B. without a demand of possession, although the object of the action was to try the title to the premises.

A. having married a woman, owner of a customary estate in fee, took a grant of the freehold from the lord, upon which livery of seisin was afterwards given. *Scilicet*, that the grant operated as an enfranchisement before the livery, and that the course of descent of the customary estate would not be thereby altered.

EJECTMENT to recover the possession of the undivided third part of three closes of land in the parish of *Millom*, in the county of *Cumberland*, upon the demise of *John Newby*, on the 1st of February, 1816. At the trial before *Bayley J.* at the *Summer assizes* for the county of *Cumberland*, 1819, the plaintiff was nonsuited, with liberty to move to set aside the nonsuit and to enter a verdict for the plaintiff; and upon the motion being made for that purpose, the Court directed the facts to be stated in a case.

The premises were three closes of land, called *Class Mire*, and *Benridding*, otherwise *Bennett Riding*. The two former closes were part of a tenement called *Upper Water Blean*, situate within the parish of *Millom*, in the county of *Cumberland*; which tenement, as well as the close called *Bennett Riding*, until the making of a deed hereinafter set forth, had been from time immemorial within and parcel of the manor or lordship of *Millom*, and customary tenements descendible, and which

had descended from ancestor to heir as of the hereditary right of the tenants, called tenant right, and holden of the lord of the said manor for the time being, as of that his manor by rents and services according to the custom of the said manor or lordship. At a court holden for the said manor, on the 8th of June, 1738, one *Ann*, the wife of one *Joseph Hunter*, formerly *Ann Leece*, spinster, was admitted to her and her heirs, according to the custom of the manor, to the premises in question with the appurtenances. By an indenture tripartite, of the 2d February, 1741, made between *A. Hudleston*, Esquire, *R. Hudleston*, and *E. Gibson*, of the first part, the said *Joseph Hunter* of the second part, and *Wm. Hudleston* of the third part, reciting, that by an act passed in the last session of parliament, entitled an act for vesting certain manors, lands, and tenements of the said *W. Hudleston*, in trustees, to be sold for the payment of his debts, the several messuages, lands, and tenements, rents, fines, heriots, boons, dues, duties, and services, and other the premises thereafter mentioned, to be purchased by the said *Joseph Hunter*, were amongst other things vested in them, the said *A. Hudleston*, *R. Hudleston*, and *E. Gibson*, and their heirs in trust, to be sold for the several uses and purposes therein above, and in the said act mentioned; and that the said *J. Hunter* stood possessed and seised to him and his heirs, according to the custom of tenant right, time out of mind, used and observed within the manor or lordship of *Millom*, of and in one customary messuage or tenement at *Crosshouse* therein particularly mentioned; and that *Ann*, the wife of the said *J. Hunter*, was and stood also possessed of and seised, to her and her heirs, according to the custom of tenant right, time out of mind, used and observed within the said manor

1823.

Doc dem.
Newry
against
JACKSON.

1823.

Doct dem.
Newey
against
Jackson.

of *Millom*, of and in one customary messuage or tenement, called *Upper Water Bleau*, in the parish of *Millom*, and holden of the said *W. Hudleston* as parcel of his said manor or lordship of *Millom*, by payment of the yearly customary rent of 6*l.* 4*s.* and other fines, heriots, boons, dues, duties, and services as aforesaid; and also of and in one parcel of customary land called *Bennett Ridding*, also situate, lying and being in the said parish of *Millom*, and holden of the said *W. Hudleston* as parcel of his said manor or lordship of *Millom*, by payment of the customary rent of 8*d.*, and also all other the rents, fines, heriots, boons, dues, duties, and services as aforesaid. And further reciting, that the said *J. Hunter*, for the sum of 90*l.*, had contracted with them the said trustees and the said *W. Hudleston* for the purchase of the freehold and seigniority, as well of the said messuage and tenement whereof the said *J. Hunter* was himself then so seised and possessed as aforesaid, as also of the purchase of the freehold and inheritance of the other messuage and tenement. And also a parcel of land, whereof *Ann* the wife of *J. Hunter* was so then seised and possessed as aforesaid. It was witnessed by the said indenture, that the said trustees, by the consent of *W. Hudleston*, testified as therein mentioned, and by virtue of the said trust and power to them by the said act granted, and in pursuance of the said contract, and in consideration of the said sum of 90*l.* to them in hand paid by the said *J. Hunter* before the execution of the indenture, which was the best price and most money that could be gotten for the same, did grant, bargain, sell, alien, enfeoffe, and confirm unto *J. Hunter*, his heirs and assigns, all the said messuages or tenements, and parcel of land, being parcel of the said manor or lordship of *Millom*,

and

1823

and

and then in the tenure or occupation of the *J. and Ann Hunter*, as customary tenants thereof, or his farmers or under-tenants of the same, with their and every of their appurtenances, and the freehold and inheritance thereof, and all commons, &c. with all that their estate, right, title, &c. to the said premises; and with the appurtenances, saving, reserving, and excepting to the said *W. Huddleston*, his heirs and assigns, lords of the said manor as thereafter was mentioned; to have and to hold the said messuages and tenements, and parcel of land, unto the said *J. Hunter*, his heirs and assigns, to the only proper use and behoof of him, *J. Hunter*, his heirs and assigns for ever, in fee farm, according to the course of common law, absolutely freed and discharged of and from all customary and other rents, fines, boons, dues, duties, and services whatsoever, thereafter to become due and payable to the said *W. Huddleston*, his heirs or assigns, lords of the said manor or otherwise, yielding and paying, therefore, to the said *W. Huddleston*, his heirs and assigns, the rent of one pepper corn, on the 29th of *September* yearly, if lawfully demanded, and doing and performing suit of court at the several courts leet, courts baron, and customary courts of the said *W. Huddleston*, his heirs and assigns, to be holden for the said manor or lordship, and saving and excepting mines, &c. The deed also contained a power of attorney from the trustees to a person therein named, to give livery of seisin to the said *J. Hunter*; and which livery of seisin was afterwards duly given, and a memorandum thereof indorsed upon the deed. *J. Hunter* died, seised of such estate as he took under the deed, if any, on the 27th *March*, 1762, leaving his widow *Ann* surviving, who died in 1776, leaving two sons, of whom *Wm. Hunter* was the elder, her surviving. The said

1623.

DOX dem.
NEWBY
against
JACKSON.

1823.

DOX dem.
NEWBY
against
JACKSON.

W. Hunter entered upon the premises, but the precise time of his entry was not proved at the trial, and continued in possession until the 6th *February*, 1800, when he died in possession and in seisin thereof (if the Court should be of opinion that his father had been seised) without leaving any issue, but having first, by his last will duly executed, devised the premises in question to his wife for life, and after her decease, to one *Wm. Wyld* in fee. Upon the death of *W. Hunter*, his widow entered upon and enjoyed the same until her death in 1815. *W. Wyld*, the devisee named in the will, died in the lifetime of the testator. At the time of the death of the widow of *W. Hunter*, and also at the time of the demise laid in the ejectment, the lessor of the plaintiff, *J. Newby*, was one of his co-heirs at law, *ex parte paternâ*, but not *ex parte maternâ*, of one undivided third part of the said messuages or tenements, and parcel of land. The defendant was put in possession of the premises by *John Wyld*, who was the eldest son of *W. Wyld* the devisee, and which said *John Wyld* was also heir *ex parte maternâ* to the late *W. Hunter*. By a memorandum of agreement in writing, made the 3d *May*, 1819, (and which was before the service of the declaration in ejectment in this cause) between the said *John Newby*, the lessor of the plaintiff of the one part, and the said *James Jackson*, the defendant, of the other part, and which agreement was signed as well by the said *J. Newby* as by the said *J. Jackson*, *J. Newby* agreed to sell, and *J. Jackson* agreed to purchase, in case the said *J. Newby* should be found the owner thereof, all those freehold closes of land, called *Benridding close*, *Mire*, *Great Meadow*, and *Long Meadow*, situate in the parish of *Millom*, in the county of *Cumberland*, late the property of *W. Hunter*, deceased. The price was settled by arbitrators.

bitrators. And the said *J. Jackson* agreed to pay the purchase money for so much, and such part (if any) of the above premises as the said *J. Newby* could give a good title in the law to at *Candlemas* then next, with interest for the same in the meantime, at and after the rate of 4l. 6s. per cent. per annum. And the said *J. Newby* agreed to grant, release, and convey the said five closes, or so much, and such part thereof, as he could give a good and sufficient title in the law to the said *J. Jackson*, his heirs, and assigns, or as he or they might appoint upon payment, or sufficient security given for payment of the purchase money of the said premises. The said *J. Jackson* to have possession from the time of the date of the agreement. The premises mentioned in the declaration in ejectment, are part of the premises mentioned in the above agreement. At the time of making and signing the agreement, the defendant was in possession of the disputed premises, and remained in possession thereof, until and after the service of the said declaration in ejectment. No demand of the possession of the said premises sought to be recovered in this action was ever made on the defendant, nor was any notice given him to quit the same.

Tindal for the plaintiff. The real question intended to be decided by this action was, whether the estate which the lessor of the plaintiff seeks to recover, descended ex parte paternâ or ex parte maternâ. But an agreement executed by the lessor of the plaintiff, and stated above, has been set up as an answer to the action; and, therefore, the first thing to be considered is the effect of that instrument. In the case of *Right dem. Lewis v. Beard* (a), the original ownership of the pro-

1823.

Deo dem.
Newby
against
Jackson.

(a) 15 East, 210.

1823.

—→
Doe dem.
Newby
against
JACKSON.

perty was not in dispute, and *Lewis* had received a part of the purchase money from the defendant. That case, therefore, differs from the present; for here it was manifestly the intention of the parties, that the trial as to the title should proceed, and the possession given by the agreement is to be taken with reference to that object, and ought not to preclude this question. But if that be not so, still the day of the demise in the declaration is prior to the date of the agreement, and if the lease to *John Doe* was good, the second lease to the defendant could not take effect. Neither could the agreement operate as a release of the action, for the lessor of the plaintiff cannot release. *Doe dem: Byne v. Brewer.* (a) At all events, nothing more than a strict tenancy at will was created, which may be determined by any notice; now, it is found that the defendant continued in possession after the service of the declaration, and that service was sufficient notice to determine the tenancy.

Littledale, contra. The case of *Right d. Lewis v. Beard* is parallel to this, and clearly shews that the agreement set forth created a tenancy. The date of the demise laid in the declaration cannot affect the question, nor can the service of the declaration be deemed a determination of the tenancy for the purposes of the present action, which must proceed on the ground that the defendant was a wrong-doer at the date of the service, *Doe v. Wilson.* (b)

BAYLEY J. There is no doubt that an ejectment treats the tenant in possession as a wrong doer at the time when the action is brought. If he be lawfully in

(a) 4 M. & S. 300.

(b) 11 East, 56.

possession

possession then, it is an answer to the action, whatever may be the date of the demise laid in the declaration; for an ejectment is altogether a fictitious remedy. Here, before the ejectment was brought, viz. on the 3d of May, 1819, an agreement was made between the lessor of the plaintiff and the defendant, that the former should sell to the latter the fee simple of the premises in question, if it turned out that he had a title to them, and it was thereby stipulated that the defendant should have possession from the date of the agreement. That created a tenancy, which was not determined before the commencement of this action; a nonsuit must, therefore, be entered.

1823.

Doe dem.
Newby
against
JACKSON.

HOLROYD and BEST Js. concurred.

Judgment of nonsuit.

Besides the point upon which the judgment of the Court proceeded. The effect of the deed of the 2d of February, 1741, was discussed.

Tindal, for the lessor of the plaintiff, contended, that the effect of it was to create a new estate, descendible to the heirs ex parte paternâ. Before the execution of that deed of feoffment, the freehold of the customary estate, like that of a copyhold, was in the lord. *Stephenson v. Hill.* (a) *Burrell v. Dodd.* (b) *Doe dem. Redy v. Huntington.* (c) At the time of the feoffment, *Joseph Hunter* had an estate for life in right of his wife (d); the feoffment, therefore, must have operated either as an extinguishment or suspension of the customary estate.

(a) 3 Burr. 1278.

(b) 3 B. & P. 378.

(c) 4 East, 289.

(d) Co. Lit. 351. a.

1828. *Lane's case*. (a) *Beauch's case*. (b) *Ree v. Briggs*. (c)

Don den.
Navy
Cotton
Jackson

If as an extinguishment, then, on *A Hunter's* death, the legal estate descended to his son, subject to a trust for his mother. *Wynne v. Cook*. (d) *Chudlow v. Marshall*. (e) *Watk. on Copyholds*, 559; and at her death the equitable estate would be merged, and the whole would descend ex parte paternâ. *Selby v. Alston*. (f) *Goodright v. Wells*. (g) Or, if it only operated as a suspension, which might be the case according to *Cra. Eliz. 8. Anon. & Watk. Copyholds*, 551., still the freehold and customary estates uniting in the son, would create a new estate descendible ex parte paternâ.

Littledale, contra. The deed in question merely operated as an enfranchisement of the customary estate, the only effect of which was to release the services, and the lands being still held to the same uses, would descend as before. *Com. Dig. Descent*. (C b). If that deed be not an enfranchisement, it must be considered as a grant to a stranger, and then the freehold being severed from the manor, the customary estate would not be destroyed, but would become free, and would still descend as before. *Murrell's case*. (h) *Gill. Ten.* 208. Should it be contended that the customary estate would not, under such circumstances, become free, then it follows, that the freehold is capable of a separate existence in a stranger, and if so, it would still be severable when it descended to the son, as stated in this case. He might have sold or devised it, the customary estate would not, therefore, merge, but both being left to descend, the customary

(a) 2 Co. 17.

(c) 16 East, 406.

(e) 2 Ves. jun. 524.

(g) 2 Doug. 771.

(b) 4 Co. 31.

(d) 1 Br. Ch. Ca. 515.

(f) 3 Ves. 339.

(h) 4 Co. 24. b.

estate might go to the heirs *ex parte maternâ*, and the freehold to the heirs *ex parte paternâ*.

1823.

Dox dem.
Newry
against
JACKSON.

The Court said, that as it was not necessary to determine this point, which was one of considerable difficulty, they abstained from giving any decided opinion; but intimated, that they thought the deed of *February 2d*, 1741, operated as an enfranchisement before livery of seisin was given, and that the course of descent was not thereby altered.

SPENCER and Another *against* MARRIOTT, Executor of SARAH MARRIOTT, deceased.

COVENANT by the lessee against the executor of the lessor for breach of the following covenant for quiet enjoyment contained in a lease granted by the testator of certain premises in *Guilford-Street*: "That the plaintiffs should and might hold the premises demised during the term granted, without any lawful let, suit, trouble, molestation, eviction, interruption, claim, or demand whatsoever, by or from the lessor, her executors, administrators or assigns, or any person or persons whomsoever, claiming or to claim, by, from, under, or in trust for her, them, or any of them; or by, or through, her or their acts, means, right, title, forfeiture, privity, or procurement." The declaration alleged, that at the time of making the lease to the plain-

Covenant by the lessor that the lessee should hold the premises without any lawful let, suit, interruption, eviction by the lessor, or by or through the lessor's acts, means, right, &c. The lessor held, under a lease, for a longer term, which contained a clause of re-entry by the original lessor in case the premises should be used for a shop. The under-lessee was not informed of this

clause, and underlet to a tenant, who incurred a forfeiture by using the premises for a shop; and the original lessor evicted him: Held, that this was not an eviction by means of the lessor within the meaning of the covenant in the underlease.

tiffs,

1823.

*Stewart v.
Leopold
Mansfield.*

(*tiff*, the defendant's testator held the same by a lease for a longer term of years under the *Rowling* hospital, which lease contained a clause of re-entry by the governors of the hospital, in case the premises should be used for any shop, warehouse, or other place for carrying on any trade, or in case any open or public show of business should be suffered therein; and also a covenant on the part of the lessees of the hospital, not to use or suffer the premises to be used for such purposes; that the plaintiffs, in ignorance of this clause contained in the lease of the hospital, underlet the premises to a person who exercised the business of an auctioneer in them; that the governors of the *Rowling* hospital took advantage of the clause of forfeiture in their lease, in consequence of such public business being carried on in the premises: the breach of covenant alleged was, that the plaintiffs were evicted from the premises by the means of the defendant's testator, to wit, by means of her neglecting and omitting to insert, or cause to be inserted in the said lease made by her to the plaintiffs, any covenant similar to the said covenant on the part of the lessees of the hospital, and of her neglecting and omitting to give the plaintiffs any notice of such covenant, or of the clause of re-entry aforesaid; and special damages were assigned. The declaration was demurred to generally.

Amos, in support of the declaration. No laches can be imputed to the plaintiffs for not investigating at the time of their taking a lease of the premises, the qualifications to which this lessor's title was subject. The authorities incline against the right of the lessee to an inspection

inspection of the title of a testator, *Widd v. Polyak* (a), *Guillem v. Stone* (b). The word "means" has a most extensive signification. In *Buller v. Swanwick* (c), the word "means," in a covenant, was held to have a much more extensive signification than the words "act or procurement." Besides, the covenant is to be construed most strongly against the covenantor: (d).

1823.

—
Guillem v. Stone
 against
Mannebb.

Per Curiam. If the defendant's testator has been guilty of any improper concealment whereby the plaintiffs have sustained damage, that may be the proper subject of an action on the case; but in order to maintain this action, it must be shewn that a breach of the covenant contained in the lease has been committed. The covenant is, "that the lessee should hold the premises without any lawful eviction, interruption, &c. by or from the lessor, or by or through her acts, means, right, title, forfeiture, privity, or procurement." Now the word "acts" means something done by the person against whose acts the covenant is made, and the word "means" has a similar meaning, something proceeding from the person covenanting. Now, the eviction was not produced by any thing proceeding from the covenantor, but from the person in possession of the premises. Our judgment must, therefore, be for the defendant.

Judgment for the defendant.

F. Pollock was to have argued in support of the demurrer.

(a) 11 Ves. jun. 337.

(b) 3 Term. 435.

(c) Cro. Jac. 656.

(d) *Steph. Planché* 168.

1823.

WINSTONE the elder and WINSTONE the younger
against LINN.

Declaration upon an indenture of apprenticeship for breach of a covenant whereby the defendant, in consideration of a premium of 90*l.*, cove-

COVENANT upon an indenture of apprenticeship, bearing date the 11th *April*, 1820, whereby the defendant, in consideration of a premium of 90*l.*, covenanted with the plaintiffs that he, defendant, would, during four years, instruct *Winstone* the younger in the

Declaration upon an indenture of apprenticeship for breach of a covenant whereby the defendant, in consideration of a premium of 90*l.*, covenanted to instruct the apprentice in his trade, and provide him with diet, &c. Breach, that the defendant did not, after making the indenture, instruct the apprentice, but on the contrary refused so to do; and after the making of the indenture, to wit, on the 13th of *July*, refused then or at any other time to instruct him, and that the defendant did not, after the making of the indenture, provide the apprentice with diet, &c., but on the contrary thereof, on the 13th of *July* compelled him to quit his service before the expiration of the term. Plea as to the not instructing and not providing with diet and lodging before the 10th of *July*, that he did instruct and provide him with diet and lodging till that time. Upon this plea issue was taken and joined. And as to the not instructing and not providing with diet and lodging upon and after the 10th of *July*, that the defendant was ready and willing to instruct and provide the apprentice with diet and lodging during the whole term, but that the apprentice would not, after making the indenture, serve the defendant, but frequently, and particularly on the 10th of *July*, refused so to do, and that on the 10th day of *July* the apprentice refused to do particular acts therein mentioned, which he was bound to do as such apprentice; and on the contrary thereof, against the positive orders of the defendant, absented and wholly withdrew himself from his service, declaring that he never intended to return again to his service, whereby defendant was prevented from instructing and providing him with diet and lodging according to the indenture. Replication, that after the apprentice had been guilty of the supposed breaches of duty as mentioned in the plea, to wit, on the 13th of *July*, he, the apprentice, returned to the defendant, and offered to serve him as such apprentice during the residue of the term, and requested him to receive him, and provide him with diet and lodging, but that defendant refused so to do. Demurrer, assigning for cause that plaintiff had by his declaration complained of a continued breach of covenant in not instructing, &c. the apprentice from the time of making the indenture till the commencement of the suit; and although the second plea answered to the whole time in the declaration after the 30th of *July*, yet that the plaintiffs had omitted to reply to such parts of defendant's second plea as related to not instructing, &c. the apprentice on the 10th of *July*, and between that time and the 13th of *July*: Held, that the plaintiffs' claim was not entire, but divisible, and covered every part of the time during which the master refused to instruct the apprentice, and consequently that there was no discontinuance: Held, also, that the replication was not a departure from the declaration, the gravamen of the complaint being that the defendant had compelled the apprentice to quit his service, and the replication shewing the manner in which he had so done it: Held, also, that the covenants in an indenture of apprenticeship are independent covenants, and consequently that acts of misconduct on the part of the apprentice stated in the plea were not an answer to an action brought for breach of the covenant by the master to instruct and maintain the apprentice during the term agreed upon by the indenture.

trade

trade and business of a tobaccoconist, and also provide him with sufficient diet and lodging in the dwelling-house of the defendant. The declaration averred, that the son entered into the defendant's service, and then assigned a breach as follows; that the defendant did not, after the making of the indenture, instruct the apprentice in the trade of a tobaccoconist; but, on the contrary thereof, had hitherto altogether refused so to do. And after the making of the said indenture, to wit, on the 13th day of *July*, wholly refused then or at any other time to instruct the said *Thomas Winstone* the younger in the said trade, contrary to the covenant. And that the defendant did not, nor would, after the making of the said indenture, provide the said *T. Winstone* the younger with suitable diet and lodging, although he, the said *T. Winstone* the younger, at all times after the making of the said indenture, was willing to take his meals with the defendant; but, on the contrary thereof, he, the defendant, afterwards, to wit, on the 13th day of *July*, in the year aforesaid, compelled the *T. Winstone* the younger to quit his service before the expiration of the time agreed upon for the said *T. W.* remaining therein, and refused to maintain and keep him, contrary, &c. Plea first, as to so much of the breaches of covenant as related to the not instructing the said *T. Winstone* the younger, and not providing him with diet and lodging *before* the 10th day of *July*: that he did instruct him till that time, and did provide him with suitable and sufficient diet and lodging, according to the tenor of the covenant. Upon this, issue was taken and joined. And as to so much of the breaches of covenant as related to the not instructing the said *T. Winstone* the younger, and not providing him

1823.

*Winstone
against
Linn.*

1828.]

Wm. W. W.
appears.
Lanc. I.

him with diet and lodging upon and after the 10th day of July aforesaid; that he, the defendant, was ready and willing to instruct the said T. W. the younger in the said business, and provide him with diet and lodging during the whole of the said years; but that the said T. W. the younger did not, nor would, after the making of the said indenture, serve the defendant as an apprentice in his said trade; but afterwards, on the 12th April in the year aforesaid, and on divers other days and times between that day and the said 10th day of July, wholly refused so to do; and on several of those days and times aforesaid refused to obey him in his said business, and to render him, defendant, a proper account of his monies from time to time entrusted to the said T. W. the younger, as such apprentice. And that when, on the 10th of July, he ordered the said T. W. the younger to add up the day-book used in his said business, which it was the duty of the said T. W. the younger, as such apprentice, to have done, he, the said T. W. the younger refused so to do; and on the contrary thereof, then and there, against the positive orders of the defendant, absented and wholly withdrew himself from the service of the defendant in his said business; he, T. W. the younger, then and there declaring to the defendant that he never intended to return again to such service, whereby the defendant was prevented from instructing the said T. W. the younger, and from providing him with diet and lodging, according to the said indenture, as he, the defendant, would otherwise have done. Replication, that after the said T. W. the younger had been guilty of the said supposed misconduct and breaches of duty as such apprentice as in the said second plea mentioned, and during the term in the indenture

indenture mentioned, and before the exhibiting of the plaintiff's bill to wit on the 13th day of July in the said T. W. the younger returned to the defendant, and tendered and offered himself to the defendant, to serve and obey him as such apprentice, and was then and there ready and willing, and offered to the defendant then, and during the residue of the said term, well and truly to perform all things in the said indenture contained on his part to be performed, and then and there requested the defendant to receive him, the said T. W. the younger, as such apprentice, and to continue to instruct him in the said trade of a tobacconist; and provide him with sufficient diet and lodging in pursuance of the indenture; but that the defendant then and there wholly refused to teach or instruct the said T. W. the younger in the said trade, and wholly refused so to do, or any longer to provide him with suitable and sufficient diet and lodging according to the indenture.

Special demurrer, assigning for causes, that although the plaintiff in the declaration complained of a continued breach of covenant, in not instructing the apprentice from the time of making the indenture to the commencement of the suit, as well as of a particular refusal to instruct him, alleged to have been made on the 13th July in the year aforesaid; and that the defendant would not, after the making of the said indenture, provide the said T. W. the younger with suitable diet and lodging; and, although the second plea of the defendant answers to the whole of the time in the declaration, on and after the 10th day of July in the year aforesaid, yet the plaintiff has wholly omitted to reply to such part of the defendant's second plea, as relates to not instructing the said T. W. the younger, and not providing him with diet and lodging.

on

1828:

Warrant
against
Laws.

1823.

WINDSOR
against
LAW.

on the said 10th day of *July*, or between that time and the 13th day of *July*, and have thereby wholly discontinued their action as to the latter period of time.

E. Lucas, for the demurrer, contended, first, that the master of an apprentice was not bound to take him back into his service under the circumstances disclosed in the special pleas; and admitted by the replication. *Cyff v. Brown*. (a) So an apprentice is not bound to return, if required so to do, after licence from his master to leave his service. *Anon.* (b) The contract is entire, and imports mutual conditions to be performed at the same time; and the plaintiffs having in every respect violated the contract, cannot sue the defendant upon it. *Kingston v. Preston*. (c) The defendant's performance is also prevented by the act of one of the plaintiffs. (d) This is like the case of a brewer who, having repeatedly furnished bad beer, cannot complain of a refusal to deal with him. *Holcombe v. Hewson*. (e) The case of *Weaver v. Sessions* (f) is very different from the present; the contract there not being entire, and there having been a liberty to buy of others; besides, the plea in that case did not connect the malt purchased with the orders given. The statutes respecting apprentices do not affect the case; and there is no distinction between contracts of apprenticeship under seal, and those between master and servant by parol. In several nisi prius cases between master and servant, misconduct on the part of the latter, and refusal to obey his master's commands, have been held sufficient to justify dismissal and nonpayment of

(a) 5 Price, 297.

(b) 6 Mod. 70

(c) 2 Doug. 691.

(d) 1 Roll. Abr. 455.

(e) 3 Campb. 391.

(f) 6 Taunt. 154.

wages. *Robinson v. Hindman* (a), *Spain v. Arnott* (b); *Williams v. Rice*. (c) Secondly, he contended that there was a discontinuance, as pointed out in the causes of demurrer to the replication; and if so, the plaintiff could not have judgment, whether the defendant's pleas be good or bad. *Tippet v. May*. (d) The plaintiff having taken issue on the defendant's pleas as to his performance of the covenant from the execution of the indenture to the 13th of *July*, the whole of the first breach could not be considered as confined to a refusal to teach, &c. on that day. This case, therefore, differs from *Harris v. Freemantle*. (e) Thirdly, there is a departure, inasmuch as the declaration states that the apprentice continued in the defendant's service to the 13th of *July*, and that the latter forced him to quit his service on that day; but the replication admits the contrary, and only relies on a refusal to take him back on his return to the defendant on the 13th of *July*. A departure in pleading is matter of substance and ground of general demurrer. *Niblett v. Smith* (f), and other cases cited in 2 *Saund.* 84. b. Lastly, the replication is bad, as concluding with a general prayer of damages. The plaintiffs should have new assigned. *Anon.* (g) *Scott v. Dixon*. (h) This is also ground for general demurrer.

1823.

 WINSTON
 against
 LINN.

BAYLEY J. There is not any pretence for saying that there is a departure in this case. It would have

(a) 3 *Esp.* 235.(b) 2 *Star.* 256.(c) *Middlesex* sittings after *Easter* term, 3 G. 4. before *Abbott C. J.*(d) 1 *B. & P.* 411.(e) 3 *T. R.* 7.(f) 4 *T. R.* 504.(g) 6 *Mod.* 70.(h) 2 *Wils.* 4. 1 *Saund.* 299. a.

1823.

WIMSTONE
against
LAWN.

been a departure if the plaintiffs had put their case in the replication upon a different ground from that contained in their declaration; but I am of opinion that they have not done so. The declaration charges generally, that the master, from the time of making the indenture, did not instruct and maintain the apprentice, and that he compelled him to leave his service on the 13th of *July*. The gravamen of the complaint is, that the master compelled the apprentice to leave the service. The replication then shews the mode by which the master compelled him to quit his service, viz. by refusing to receive him again after his misconduct. That is not taking a new ground, but supports and fortifies the declaration; it cannot, therefore, be a departure.^(a) I am also of opinion that there is no discontinuance in this case. It is said that the plaintiffs in their declaration claim an entire thing, and afterwards in their replication narrow their claim, instead of answering the whole of the defendant's second plea; and, therefore, that there is a discontinuance of the action as to that part of the claim which they have so abandoned. The charge in the declaration is, that after making the indenture, the defendant would not instruct the apprentice; and that on the 13th of *July* he wholly refused then, or at any other time, to instruct him; and that he would not provide him meals, &c. It is not one entire claim, but divisible, and covers every part of the time during which the master refused to instruct the apprentice. The defendant's second plea affects to answer the claim of the plaintiffs, as to all the time after the 10th of *July*; now that is fully answered, by shewing that the

(a) *Co. Lit.* 304. a. 2 *Saund.* 84. a.

apprentice made a subsequent tender of his services, whereupon the master ought to have taken him back. The fallacy of the argument consists in considering this as one entire claim for one entire period of time, instead of a divisible claim. I am also of opinion that the plaintiffs are entitled to the judgment of the Court upon the more important question in the case. That question is, whether the master is at liberty to insist that the indenture is no longer binding upon him, because the apprentice has unwarrantably refused to obey the commands of his master. By the indenture, the master covenants that he will for four years instruct and maintain the apprentice. Upon this record we are not at liberty to assume, that there are any other covenants in the indenture than those set out. Such indentures generally contain reciprocal covenants by each party. Those covenants are not dependent, but are mutual and independent, entitling each party to his remedy for a breach of them. The master, therefore, is liable to an action for a breach of the covenant, to instruct and maintain the apprentice during the term agreed upon. If the second plea be good in this case, there is a sufficient answer to this action. In that plea he relies upon a disobedience of orders, and upon the circumstance that the apprentice withdrew himself from his service, and declared his intention never to return. And if he had continued to absent himself to the end of the term, there can be no doubt that that would have been an answer to the action; but it appears by the replication that the apprentice did return, and offered to serve the master during the remainder of the term, and that the latter refused to receive him. I have entertained some doubt whether the replication ought not to

1823.

 WINSTONS
 against
 LINN.

1823.

WILKINSON
against
Lynn.

have averred this offer to have been made within a reasonable time; but I am now satisfied that it lay upon the defendant to have rejoined, that an unreasonable time had elapsed before the offer was made. That being so, the question arises upon these pleadings, whether disobedience of orders, or other acts of misconduct by the apprentice, will entitle the master to put an end to the contract of apprenticeship. I am of opinion that it does not. If the parties had intended that the master should have such a power, they might have provided for it by the express terms of the deed. Not having done so, we must conclude that it was not intended that he should have any such power. In the case of parish apprentices, the legislature by 20 G. 2. c. 17. expressly provided, that the indentures may be discharged upon complaint made by the master to two justices, touching the misconduct of the apprentice in his service. The legislature must have thought, therefore, that without such an express provision, the master of an apprentice would not, at common law, have the power of putting an end to the contract in case of the misconduct of the apprentice. The cases which have been referred to in argument, arising out of the relation of master and servant, do not apply to the present. In the case of apprentices a premium is usually given, in consideration of which the master expressly contracts to instruct and maintain the apprentice during a given term. The premium is a consideration for the instruction and maintenance during the entire term. Where the ordinary relation of master and servant subsists, it is a condition implied from the very nature of the contract, that the master should only maintain the
servant

servant so long as he continues to do his duty as servant ; and the contract is to endure for a reasonable time if no specific time be fixed, and is determinable by a reasonable notice. For these reasons I am of opinion, that the plaintiff is entitled to the judgment of the Court.

1823.

Winstone
against
Lamb.

HOLROYD J. I think that the formal objections to the replication, on the ground of departure and discontinuance, have been already fully answered. With respect to the general question, I am also of opinion that the plaintiff is entitled to judgment. The cases which have been referred to in argument, and which have arisen out of the relation of master and servant, do not bear upon the present question. Under that contract, the master, in consideration of the servant performing his service, undertakes to maintain him and pay him wages. The moment the latter ceases to do his duty properly as a servant, the consideration for the maintenance and wages fails. The relation that subsists between a master and an apprentice is very different : under that contract all the acts are not to be done by the apprentice, but the master agrees to give him instruction ; and the great object of the contract is, that a young person entering into life should receive instruction and protection from the master. The latter has a greater controul over his apprentice than over a mere servant, for he may even correct his apprentice. The master, too, usually receives a premium, which is paid him as a consideration for instructing the apprentice during the term agreed upon. If the argument urged on the part of the defendant were to prevail, the effect would be to deprive the apprentice of that protection which it was the object of the indenture

1823.

Whitstone
against
Lynn.

indenture to give him, and to leave him at liberty to go where he pleased. The statute relative to parish apprentices tends strongly to shew, that at common law, the master had no power to put an end to the contract of apprenticeship. It is true, that this is not an indenture within the statute, and it must therefore be construed as if the statute had never passed; but the statute nevertheless shews, that the understanding of the legislature at that time was, that under indentures in the common form, the master had no right to put an end to the contract in consequence of the misconduct of the apprentice.

Barr J. I entirely concur in the opinions pronounced by my learned Brothers. The argument is, that if the apprentice be guilty of a single act of misconduct, or be absent from the service of the master for two days, he is to lose the benefit of the instruction to which he was entitled by the indenture, and for which the premium of 90*l.* was paid; and it has been said, that the act of going away, accompanied with the declaration that he would not return, deprived him of the protection of his master. But it would be most unjust if a single act of misconduct were to deprive a young person of the protection and instruction which he was to receive in virtue of the indentures, and for the continuance of which for a given time a valuable consideration has been paid. The master has at common law a complete remedy, if the apprentice misconducts himself, by an action for a breach of the covenants. The provisions contained in the statute relative to parish apprentices shew, that at common law, the master could

not determine the contract, if the apprentice misconducted himself. I am, therefore, of opinion, that the plaintiffs are entitled to recover.

1823.

WIMBORNE
against
LINN.

Judgment for the plaintiffs.

END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

1823.

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fourth Year of the Reign of GEORGE IV.

MEMORANDUM.

IN the course of this vacation *John Hullock, Esq.*, Serjt. at law, was appointed one of the Barons of the Exchequer, (on the resignation of Mr. Baron Wood,) and took his seat in that court on the first day of this term.

DRAKE *against* MARRYAT.

Thursday,
April 17th.

ASSUMPSIT on a policy of insurance on sugars, at and from *Matanzas* to port or ports of discharge in *Europe* between *Saint Petersburg* and *Bordeaux*, that although the defendant was a subscriber to *Lloyd's*, a certificate agent, resident abroad, was not admissible to prove the amount of the damage.

In an action against an underwriter upon goods which sustained sea-damage: Held, granted by their

1823.

— 208-1
DRAKE
MAYOR.
JATSON

both included. The sugars were warranted free from average under 51. per cent. At the trial before *Abbott C. J.*, at the *London* sittings after last term, it appeared that the vessel discharged at *St. Petersburg*, and that the sugars had been damaged by perils of the sea. In order to prove damage to a greater amount than 51. per cent., the plaintiff tendered in evidence a certificate of the agent to *Lloyd's*, resident at *Petersburgh*, signed by him after surveying the sugars. The following admissions were, entered into by the parties. The merchants, shipowners, and underwriters in *London*, have been for centuries in the habit of meeting at *Lloyd's* for the purpose of transacting the business of insurance. The management of the affairs at *Lloyd's* has always been conducted by a committee of nine members appointed at a general meeting of the subscribers; the authority of the committee is vested in them by a deed, executed by such of the subscribers as vote in the election of the committee; the committee, in pursuance of this deed, nominate agents at nearly all the out-ports in the united kingdom, and all foreign ports over the world with which any trade is carried on; printed instructions are sent out to the agents on their appointment, requiring them to communicate to the committee all the information that they can collect regarding trade and commerce generally, and all losses, misfortunes, and accidents which may happen to ships or property within the district for which they are respectively nominated. The printed instructions transmitted to the agents contain the following passages. "No power from the subscribers to *Lloyd's* can divest the assured, their agents or assigns, or the masters of vessels, of that right over property which the law has given them; but it is presumed, that
the

the assured or their representatives will readily avail themselves of the assistance of an agent, who is appointed by the general body of subscribers to act on their behalf, and whose co-operation will facilitate the settlement of loss or average with the underwriters.

When called upon by consignees to ascertain damage, the agent is to act as a surveyor only, and in this capacity to require the presence at surveys of the master of the vessel by which the goods have been imported, who is to sign the certificate of the damage. The agent is further to see that the sound part of every package is separated from the damaged, and particularize the quantity of each in his certificate, taking care in the first instance to satisfy himself, that the goods were properly stowed, and that the damage was occasioned by sea water whilst on board. The sale must take place within a reasonable time from the period of landing, otherwise the underwriters will be exonerated; and in such case the agent is not to act. The agent is not to make up or sign any statement of average, either general or particular, as representative of the underwriters leaving that to be adjusted between them and the assured upon the documents which he furnishes."

It was further admitted, that the persons by whom this policy was effected and the Defendant were at the time subscribers to *Lloyd's*, and had executed the deed from which the committee derived their authority. The question meant to be tried was, whether the certificate signed by *Lloyd's* agent was admissible in evidence against the defendant. The Lord Chief Justice held it inadmissible, and nonsuited the plaintiff with leave to move to enter a verdict in his favour.

1823-
1824-
1825-
1826-
1827-
1828-
1829-
1830-
1831-
1832-
1833-
1834-
1835-
1836-
1837-
1838-
1839-
1840-
1841-
1842-
1843-
1844-
1845-
1846-
1847-
1848-
1849-
1850-
1851-
1852-
1853-
1854-
1855-
1856-
1857-
1858-
1859-
1860-
1861-
1862-
1863-
1864-
1865-
1866-
1867-
1868-
1869-
1870-
1871-
1872-
1873-
1874-
1875-
1876-
1877-
1878-
1879-
1880-
1881-
1882-
1883-
1884-
1885-
1886-
1887-
1888-
1889-
1890-
1891-
1892-
1893-
1894-
1895-
1896-
1897-
1898-
1899-
1900-
1901-
1902-
1903-
1904-
1905-
1906-
1907-
1908-
1909-
1910-
1911-
1912-
1913-
1914-
1915-
1916-
1917-
1918-
1919-
1920-
1921-
1922-
1923-
1924-
1925-
1926-
1927-
1928-
1929-
1930-
1931-
1932-
1933-
1934-
1935-
1936-
1937-
1938-
1939-
1940-
1941-
1942-
1943-
1944-
1945-
1946-
1947-
1948-
1949-
1950-
1951-
1952-
1953-
1954-
1955-
1956-
1957-
1958-
1959-
1960-
1961-
1962-
1963-
1964-
1965-
1966-
1967-
1968-
1969-
1970-
1971-
1972-
1973-
1974-
1975-
1976-
1977-
1978-
1979-
1980-
1981-
1982-
1983-
1984-
1985-
1986-
1987-
1988-
1989-
1990-
1991-
1992-
1993-
1994-
1995-
1996-
1997-
1998-
1999-
2000-
2001-
2002-
2003-
2004-
2005-
2006-
2007-
2008-
2009-
2010-
2011-
2012-
2013-
2014-
2015-
2016-
2017-
2018-
2019-
2020-
2021-
2022-
2023-
2024-
2025-
2026-
2027-
2028-
2029-
2030-
2031-
2032-
2033-
2034-
2035-
2036-
2037-
2038-
2039-
2040-
2041-
2042-
2043-
2044-
2045-
2046-
2047-
2048-
2049-
2050-
2051-
2052-
2053-
2054-
2055-
2056-
2057-
2058-
2059-
2060-
2061-
2062-
2063-
2064-
2065-
2066-
2067-
2068-
2069-
2070-
2071-
2072-
2073-
2074-
2075-
2076-
2077-
2078-
2079-
2080-
2081-
2082-
2083-
2084-
2085-
2086-
2087-
2088-
2089-
2090-
2091-
2092-
2093-
2094-
2095-
2096-
2097-
2098-
2099-
2100-
2101-
2102-
2103-
2104-
2105-
2106-
2107-
2108-
2109-
2110-
2111-
2112-
2113-
2114-
2115-
2116-
2117-
2118-
2119-
2120-
2121-
2122-
2123-
2124-
2125-
2126-
2127-
2128-
2129-
2130-
2131-
2132-
2133-
2134-
2135-
2136-
2137-
2138-
2139-
2140-
2141-
2142-
2143-
2144-
2145-
2146-
2147-
2148-
2149-
2150-
2151-
2152-
2153-
2154-
2155-
2156-
2157-
2158-
2159-
2160-
2161-
2162-
2163-
2164-
2165-
2166-
2167-
2168-
2169-
2170-
2171-
2172-
2173-
2174-
2175-
2176-
2177-
2178-
2179-
2180-
2181-
2182-
2183-
2184-
2185-
2186-
2187-
2188-
2189-
2190-
2191-
2192-
2193-
2194-
2195-
2196-
2197-
2198-
2199-
2200-
2201-
2202-
2203-
2204-
2205-
2206-
2207-
2208-
2209-
2210-
2211-
2212-
2213-
2214-
2215-
2216-
2217-
2218-
2219-
2220-
2221-
2222-
2223-
2224-
2225-
2226-
2227-
2228-
2229-
2230-
2231-
2232-
2233-
2234-
2235-
2236-
2237-
2238-
2239-
2240-
2241-
2242-
2243-
2244-
2245-
2246-
2247-
2248-
2249-
2250-
2251-
2252-
2253-
2254-
2255-
2256-
2257-
2258-
2259-
2260-
2261-
2262-
2263-
2264-
2265-
2266-
2267-
2268-
2269-
2270-
2271-
2272-
2273-
2274-
2275-
2276-
2277-
2278-
2279-
2280-
2281-
2282-
2283-
2284-
2285-
2286-
2287-
2288-
2289-
2290-
2291-
2292-
2293-
2294-
2295-
2296-
2297-
2298-
2299-
2300-
2301-
2302-
2303-
2304-
2305-
2306-
2307-
2308-
2309-
2310-
2311-
2312-
2313-
2314-
2315-
2316-
2317-
2318-
2319-
2320-
2321-
2322-
2323-
2324-
2325-
2326-
2327-
2328-
2329-
2330-
2331-
2332-
2333-
2334-
2335-
2336-
2337-
2338-
2339-
2340-
2341-
2342-
2343-
2344-
2345-
2346-
2347-
2348-
2349-
2350-
2351-
2352-
2353-
2354-
2355-
2356-
2357-
2358-
2359-
2360-
2361-
2362-
2363-
2364-
2365-
2366-
2367-
2368-
2369-
2370-
2371-
2372-
2373-
2374-
2375-
2376-
2377-
2378-
2379-
2380-
2381-
2382-
2383-
2384-
2385-
2386-
2387-
2388-
2389-
2390-
2391-
2392-
2393-
2394-
2395-
2396-
2397-
2398-
2399-
2400-
2401-
2402-
2403-
2404-
2405-
2406-
2407-
2408-
2409-
2410-
2411-
2412-
2413-
2414-
2415-
2416-
2417-
2418-
2419-
2420-
2421-
2422-
2423-
2424-
2425-
2426-
2427-
2428-
2429-
2430-
2431-
2432-
2433-
2434-
2435-
2436-
2437-
2438-
2439-
2440-
2441-
2442-
2443-
2444-
2445-
2446-
2447-
2448-
2449-
2450-
2451-
2452-
2453-
2454-
2455-
2456-
2457-
2458-
2459-
2460-
2461-
2462-
2463-
2464-
2465-
2466-
2467-
2468-
2469-
2470-
2471-
2472-
2473-
2474-
2475-
2476-
2477-
2478-
2479-
2480-
2481-
2482-
2483-
2484-
2485-
2486-
2487-
2488-
2489-
2490-
2491-
2492-
2493-
2494-
2495-
2496-
2497-
2498-
2499-
2500-
2501-
2502-
2503-
2504-
2505-
2506-
2507-
2508-
2509-
2510-
2511-
2512-
2513-
2514-
2515-
2516-
2517-
2518-
2519-
2520-
2521-
2522-
2523-
2524-
2525-
2526-
2527-
2528-
2529-
2530-
2531-
2532-
2533-
2534-
2535-
2536-
2537-
2538-
2539-
2540-
2541-
2542-
2543-
2544-
2545-
2546-
2547-
2548-
2549-
2550-
2551-
2552-
2553-
2554-
2555-
2556-
2557-
2558-
2559-
2560-
2561-
2562-
2563-
2564-
2565-
2566-
2567-
2568-
2569-
2570-
2571-
2572-
2573-
2574-
2575-
2576-
2577-
2578-
2579-
2580-
2581-
2582-
2583-
2584-
2585-
2586-
2587-
2588-
2589-
2590-
2591-
2592-
2593-
2594-
2595-
2596-
2597-
2598-
2599-
2600-
2601-
2602-
2603-
2604-
2605-
2606-
2607-
2608-
2609-
2610-
2611-
2612-
2613-
2614-
2615-
2616-
2617-
2618-
2619-
2620-
2621-
2622-
2623-
2624-
2625-
2626-
2627-
2628-
2629-
2630-
2631-
2632-
2633-
2634-
2635-
2636-
2637-
2638-
2639-
2640-
2641-
2642-
2643-
2644-
2645-
2646-
2647-
2648-
2649-
2650-
2651-
2652-
2653-
2654-
2655-
2656-
2657-
2658-
2659-
2660-
2661-
2662-
2663-
2664-
2665-
2666-
2667-
2668-
2669-
2670-
2671-
2672-
2673-
2674-
2675-
2676-
2677-
2678-
2679-
2680-
2681-
2682-
2683-
2684-
2685-
2686-
2687-
2688-
2689-
2690-
2691-
2692-
2693-
2694-
2695-
2696-
2697-
2698-
2699-
2700-
2701-
2702-
2703-
2704-
2705-
2706-
2707-
2708-
2709-
2710-
2711-
2712-
2713-
2714-
2715-
2716-
2717-
2718-
2719-
2720-
2721-
2722-
2723-
2724-
2725-
2726-
2727-
2728-
2729-
2730-
2731-
2732-
2733-
2734-
2735-
2736-
2737-
2738-
2739-
2740-
2741-
2742-
2743-
2744-
2745-
2746-
2747-
2748-
2749-
2750-
2751-
2752-
2753-
2754-
2755-
2756-
2757-
2758-
2759-
2760-
2761-
2762-
2763-
2764-
2765-
2766-
2767-
2768-
2769-
2770-
2771-
2772-
2773-
2774-
2775-
2776-
2777-
2778-
2779-
2780-
2781-
2782-
2783-
2784-
2785-
2786-
2787-
2788-
2789-
2790-
2791-
2792-
2793-
2794-
2795-
2796-
2797-
2798-
2799-
2800-
2801-
2802-
2803-
2804-
2805-
2806-
2807-
2808-
2809-
2810-
2811-
2812-
2813-
2814-
2815-
2816-
2817-
2818-
2819-
2820-
2821-
2822-
2823-
2824-
2825-
2826-
2827-
2828-
2829-
2830-
2831-
2832-
2833-
2834-
2835-
2836-
2837-
2838-
2839-
2840-
2841-
2842-
2843-
2844-
2845-
2846-
2847-
2848-
2849-
2850-
2851-
2852-
2853-
2854-
2855-
2856-
2857-
2858-
2859-
2860-
2861-
2862-
2863-
2864-
2865-
2866-
2867-
2868-
2869-
2870-
2871-
2872-
2873-
2874-
2875-
2876-
2877-
2878-
2879-
2880-
2881-
2882-
2883-
2884-
2885-
2886-
2887-
2888-
2889-
2890-
2891-
2892-
2893-
2894-
2895-
2896-
2897-
2898-
2899-
2900-
2901-
2902-
2903-
2904-
2905-
2906-
2907-
2908-
2909-
2910-
2911-
2912-
2913-
2914-
2915-
2916-
2917-
2918-
2919-
2920-
2921-
2922-
2923-
2924-
2925-
2926-
2927-
2928-
2929-
2930-
2931-
2932-
2933-
2934-
2935-
2936-
2937-
2938-
2939-
2940-
2941-
2942-
2943-
2944-
2945-
2946-
2947-
2948-
2949-
2950-
2951-
2952-
2953-
2954-
2955-
2956-
2957-
2958-
2959-
2960-
2961-
2962-
2963-
2964-
2965-
2966-
2967-
2968-
2969-
2970-
2971-
2972-
2973-
2974-
2975-
2976-
2977-
2978-
2979-
2980-
2981-
2982-
2983-
2984-
2985-
2986-
2987-
2988-
2989-
2990-
2991-
2992-
2993-
2994-
2995-
2996-
2997-
2998-
2999-
3000-
3001-
3002-
3003-
3004-
3005-
3006-
3007-
3008-
3009-
3010-
3011-
3012-
3013-
3014-
3015-
3016-
3017-
3018-
3019-
3020-
3021-
3022-
3023-
3024-
3025-
3026-
3027-
3028-
3029-
3030-
3031-
3032-
3033-
3034-
3035-
3036-
3037-
3038-
3039-
3040-
3041-
3042-
3043-
3044-
3045-
3046-
3047-
3048-
3049-
3050-
3051-
3052-
3053-
3054-
3055-
3056-
3057-
3058-
3059-
3060-
3061-
3062-
3063-
3064-
3065-
3066-
3067-
3068-
3069-
3070-
3071-
3072-
3073-
3074-
3075-
3076-
3077-
3078-
3079-
3080-
3081-
3082-
3083-
3084-
3085-
3086-
3087-
3088-
3089-
3090-
3091-
3092-
3093-
3094-
3095-
3096-
3097-
3098-
3099-
3100-
3101-
3102-
3103-
3104-
3105-
3106-
3107-
3108-
3109-
3110-
3111-
3112-
3113-
3114-
3115-
3116-
3117-
3118-
3119-
3120-
3121-
3122-
3123-
3124-
3125-
3126-
3127-
3128-
3129-
3130-
3131-
3132-
3133-
3134-
3135-
3136-
3137-
3138-
3139-
3140-
3141-
3142-
3143-
3144-
3145-
3146-
3147-
3148-
3149-
3150-
3151-
3152-
3153-
3154-
3155-
3156-
3157-
3158-
3159-
3160-
3161-
3162-
3163-
3164-
3165-
3166-
3167-
3168-
3169-
3170-
3171-
3172-
3173-
3174-
3175-
3176-
3177-
3178-
3179-
3180-
3181-
3182-
3183-
3184-
3185-
3186-
3187-
3188-
3189-
3190-
3191-
3192-
3193-
3194-
3195-
3196-
3197-
3198-
3199-
3200-
3201-
3202-
3203-
3204-
3205-
3206-
3207-
3208-
3209-
3210-
3211-
3212-
3213-
3214-
3215-
3216-
3217-
3218-
3219-
3220-
3221-
3222-
3223-
3224-
3225-
3226-
3227-
3228-
3229-
3230-
3231-
3232-
3233-
3234-
3235-
3236-
3237-
3238-
3239-
3240-
3241-
3242-
3243-
3244-
3245-
3246-
3247-
3248-
3249-
3250-
3251-
3252-
3253-
3254-
3255-
3256-
3257-
3258-
3259-
3260-
3261-
3262-
3263-
3264-
3265-
3266-
3267-
3268-
3269-
3270-
3271-
3272-
3273-
3274-
3275-
3276-
3277-
3278-
3279-
3280-
3281-
3282-
3283-
3284-
3285-
3286-
3287-
3288-
3289-
3290-
3291-
3292

1828

DANE
v.
MAYNARD

Campbell accordingly now moved, and contended that the evidence ought to have been received. From the limit put upon the authority of *Lloyd's* agents, it must be admitted that they cannot bind the underwriters by adjusting a total loss or settling an average; but they are appointed expressly to survey goods that are damaged by perils of the sea, and to grant a certificate of the quantum of the damage. In granting such a certificate, therefore, they are acting within the scope of their authority, and a certificate so granted is good evidence against their principals. If the defendant himself had signed this certificate, he would have been bound by it, and it seems equally binding upon him, though signed by his agent. *Lloyd's* agents always authoritatively interfere in foreign ports upon any misfortune happening to property insured; they are understood to represent the underwriters; upon the certificates which they grant, losses are constantly settled; and it would be injurious to commerce if any act which they are directed by their instructions to do, could, when disagreeable to the underwriters, be treated as a nullity. In *Read v. Bonham* (a) it appears to have been thought, that an agent for *Lloyd's* resident at *Calcutta*, might even receive notice of abandonment, which would be extending his authority far beyond what is necessary for the plaintiff in this instance.

Per Curiam. If the agent had been employed by both parties to make a certificate of the loss, that might have been conclusive between them. But that was not so, and in the very instrument of appointment, the agent

(a) 5 B. & B. 147.

is spoken of as one whose co-operation will facilitate the settlement of loss or average, not as one who had authority to settle it himself. The certificate was, therefore, properly rejected. The instructions to Lloyd's agents could not have been before the Court of C. P. in *Read v. Donham*; for, by these instructions it is expressly declared, that "in no case is the agent to accept an abandonment of either ship or goods as the representative of the underwriters."

1823.
Baker
Murray.

Rule refused.

The KING against The Commissioners of Sewers *Thursday,*
for ESSEX. *April 17th.*

IN Michaelmas term last Berens obtained a rule nisi for a mandamus to the commissioners of sewers acting within the limits between Rainham bridge and Mucking mills, and the meadow grounds between Chidderditch ponds and Purfleet mills, in the county of Essex, commanding them to reimburse Anthony Harding a sum of money expended by him in the repair of the damage done on the 3d of March, 1820, to the sea-wall abutting on certain lands of the said Anthony Harding, in the level of Grays Thorock in the county of Essex, and within the jurisdiction of the said commissioners. The affidavits in support of the rule stated the following facts: A. Harding, on the 3d of March, 1820, was owner and occupier of 147 acres of land in the level of Grays Thorock; which he had then lately purchased of one Carr; the land was bounded by 151 rods of sea-wall abutting on the river Thames, in a position which

Where the owner of land in a level is bound to repair a sea-wall abutting on his land: Held, that the other land-owners in the level cannot be called upon to contribute to the repairs of the wall, although it has been injured by an extraordinary tide and tempest, unless the damage has been sustained without the default of the party generally bound to repair.

1823.

ON THE PETITION
OF THE COMMISSIONERS
OF SEWERS FOR
THE LEVEL OF GRAYS
THOROCK, IN THE
COUNTY OF MIDDLESEX,
TO DISCHARGE
THEIR LIABILITY FOR
REPAIRS OF THE
SEA-WALL OF HARDING.

rendered it more liable to accidents than any other part of the sea-wall in the level. The whole level consists of 1671 acres; and the whole length of the sea-wall is 331 rods. All the lands in the level derive an equal benefit from the sea-wall; but the commissioners of sewers have always assessed the owners of land to the repair of so much of the sea-wall as abuts upon their own lands respectively; so that *Harding*, although possessed of only one-eleventh part of the lands, is obliged to support one-sixth part of the sea-wall of the whole level. On the 8d day of *March*, 1820, an extraordinary high spring tide, accompanied by a violent tempest, did extensive and extraordinary damage to upwards of 100 rods of *Harding's* sea-wall, so as to occasion great danger and fear of a breach, whereby the whole, or the greater part of the level would have been flooded. Immediately before the said storm, the sea-wall of *Harding* was in the usual and fair state of repair, as good as it had ever been for eight years preceding, and such as would have resisted the ordinary flux and reflux of the waters. Soon after the storm, the marsh-bailiff ordered *Harding* to repair the wall, which he did at great expense, and afterwards presented a memorial to the commissioners of sewers for the level, praying to be reimbursed, which, after consideration, was dismissed. The following facts were stated in affidavits in answer: by the constant and immemorial usage and custom of the level of *Grays Thorock*, the respective sea-walls abutting upon the river *Thames*, and every part thereof, are, and constantly and immemorially have been, kept in repair under the presentments of the sewers juries, and the concurrent orders of court from time to time made thereon, at the sole, exclusive, and individual costs

costs and charges of the several and respective owners and occupiers of all such respective lands as shut by frontage upon the river Thames upon which such sea-walls are actually situate, and not by any rate or assessment made upon or at the public charge of the said level, save only and except that a public sluice, within the level by which the lands of *Harding*, in common with others within the level, are drained, and derive equal and proportional benefit, hath, as hath also the sea-wall at the head of the said sluice, been immemorially kept in repair by the marsh-bailiffs at the public expense of the level. The marketable value of all estates within the level is greatly influenced by the extent of sea-wall which the owners of them have to repair. At an annual general court of sewers, holden at *Grays Tharock* on the 8th of *July*, 1819, the jurors for the level made the following presentments: "That *Geo. David Carr*, Esq. (of whom *A. Harding* purchased,) and his trustees make good their chalking and piling from end to end of his wall by the 1st day of *October* next; penalty 60*l*. That they make good his breasting from end to end of his wall by the 1st day of *January* next; penalty 8*l*. That they fix a new third tier of piles fifteen rods at the seven-acre marsh, and fill up with chalk by the 1st of *January* next; penalty 38*l*."

An order was thereupon made by the court of sewers; the marsh-bailiff gave due notice of the presentment and order, but neither *Carr* nor his trustees, nor *Harding*, who succeeded them as owner of the lands where the works were required to be done, complied with the presentment and order at any time previous to the high wind and spring-tide; but the said work was only partially and incompletely done when the high wind and

c. 1023.

The House
of Commons
has resolved
that the
sum of 500*l*.
be paid to
the
sewers
for
the
year
1819.

.1828.

The Key
against
The Commis-
sioners of
Sewers for
Essex.

which were never traversed. In addition to which, it is now expressly sworn, that if the wall had been repaired as those presentments directed, it would not have been injured by the high tide and wind on the 30th of March, 1820. *Keighley's* case distinctly shows, that the extraordinary force of the tide is no excuse where the party bound to repair is in fault, and that case explains an opinion expressed by *Windsley J.* in *Barker's case* (a), in which he was supposed to have declared, that since the statute of sewers (b) the whole level is bound to repair, although before that time some one might have been bound by prescription to maintain the wall. It appears, that it was meant to be applied only where the party was without default. In *Ree v. Commissioners of Sewers for Somerset* (c), it appears that the wall was washed down without default in the owners of the lands on which it stood.

Scarlett and *Berens* contra. The question of law raised in this case is very important to the owners of property bounded by a sea wall. If it be held that each person is bound to repair the wall for the whole extent of the frontage of his land, it may lead to great hardship. Suppose the case of 1000 acres of land all preserved by the same wall; the owners of 500 acres may have only five yards of wall, whilst the owner of a much smaller portion may have 1000 yards; that may be washed down, the whole of his estate may be destroyed, and yet he may be compelled to repair the wall for the benefit of others. In cases of public nuisance where all

(a) 5 Co. 100.

(b) 23 H. 8. c. 5.

(c) 8 T. R. 512.

the king's subjects are concerned, the Court will not look at the quantum of property, in respect of which the burthen is imposed. But it may be, otherwise where the dispute is between two or more individuals. *Callis*, p. 122, cites the *Year-book* (a) to this effect, that frontagers and those who have free fishing in a river shall jointly perform the duty of repairing. [Abbott C. J. The general question is not open. It is clear upon the affidavits, that *Harding* is bound to repair generally, the present question depends upon the extraordinary damage, and that involves the previous state of the wall.] The passages cited on the other side from *Callis*, all refer to the law as it stood before the 28 H. 8. c. 5. He only means by them, that frontagers and owners might be bound, and perhaps actually were bound at common law before the statute of sewers was passed. [Abbott C. J. Can you contend that the liability of persons bound to repair was altered by that statute?] Unless they were bound by prescription it may have that effect. Then as to the extraordinary damage, it is stated in the affidavits in support of this application, that at the time of the accident the wall was in the usual and fair state of repair, as good as it had ever been during the last eight years, and such as would have resisted the ordinary flux and reflux of the waters. Now it is admitted, that on the 3d of *March*, 1820, there was a high spring tide and a violent wind, there is not, therefore, any reason to suppose that the wall would have been injured by any ordinary tide and wind.

1823.
The King
vs.
The Countess
of
Sewery for
Trespass.

(a) *Ass.* pl. 15.

1828.]

The King
against
The Commis-
sioners of the
Sewers for the
County of Essex.

ABBOTT C. J. It is too late now to discuss the general question which it has been attempted to raise in this case. By law, the obligation to repair sea-walls may be cast upon particular individuals, or upon all the owners of land in the level. Upon which class the burden is to fall in each particular case, must depend upon usage if any can be established. If no usage has prevailed, all those are liable who enjoy the benefit of the work. Even where an individual is bound by prescription or otherwise to repair, still if there be no default on his part, and damage is sustained by an extraordinary flood or tempest, the whole level must bear the loss and be contributory to the repairs. If upon the affidavits the question of default were doubtful, I think that a mandamus should be granted. How then does that question stand? On the one hand it is sworn, not that the wall was in good repair, but that it was in its *usual and fair state*; on the other hand it is sworn, that the repairs required by the sewers jury of the year preceding had not been completed, and that no injury would have been done by the tide and wind on the 3d of March, had the wall been in a good and sufficient state of repair. Upon these affidavits it is impossible to say, that *Harding* was not in default; the rule must therefore be discharged, and as this is a motion against a public body, I think that it should be discharged with costs.

Rule discharged with costs.

1823

The King against RICHARD DAYBELL and An-
other, Justices of the Peace in and for the
County of BUCKINGHAMSHIRE.

Friday, 19th
April 1823.

A RULE had been obtained, calling upon the defendants to shew cause why a writ of mandamus should not issue, commanding them to grant a warrant of distress, for enforcing payment from one *John T. A. Reid*, clerk, rector of *Lichampstead*, in the said county, of the sum of 18*l.* 8*s.*, to the surveyor of the highways of the parish of *Lichampstead*, being the amount of composition in lieu of statute duty, due from the said *J. T. A. Reid*, as occupier of the tithes of the said parish. It appeared by the affidavits, that the sum was duly fixed and ascertained, if the rector was in the occupation of the tithes. As to that, it was sworn by *Reid*, and not controverted, that he did not hold, occupy, or take in kind, nor had ever held, occupied, or taken in kind, any of the tithes, but had always let the same by parol, to the farmers or occupiers of the respective lands where such tithes arose; that the rents or sums of money payable to him, by the farmers in respect of the tithes, were reserved and received by equal half yearly payments, the first of which was due on *Lady-day* in every year; that the tithes were not bargained and sold when at maturity, but were let prospectively, and without reference to any specific mode of cultivation; that the rector had not any team, draught, or plough, and never used the highways of the parish, as occupier of the tithes. The composition money was duly

The Court of K. B. will not grant a mandamus commanding justices of the peace to do that which may render them liable to an action.

Quere. Whether a person, who lets his tithes from year to year to the occupiers of the lands respectively whereon they are produced, is liable to be rated to the repair of the highways.

1823.

The King
 against
 The Justices of
 the Peace for
 the County of
 Middlesex

duly demanded, and *Reid* refused to pay it; and application being made to the defendants for a warrant of distress, they refused it, and assigned, as a reason for their refusal, that they thought *Reid* was not liable to the performance of statute duty, or payment of composition; for, in consequence of his having let or compounded with the farmers for his tithes, the whole statute-duty devolved upon the farmers, as occupiers of the tithes.

Dober shewed cause against the rule. Under the circumstances disclosed by these affidavits, it is quite clear, that the rector was not an occupier of tithes, within the meaning of the 13 G. 3. c. 78., and 34 G. 3. c. 74. He never took the tithes in kind, nor did he bargain and sell them to the farmers from time to time, when they were actually in existence. They were let from year to year, at a certain rent, without reference to the mode of cultivation. Under such a contract, the relation of landlord and tenant subsisted between the rector and the occupiers of the land in his parish. He cannot, therefore, be said to occupy the tithes, and if that be so, clearly he is not within the words of the statutes, nor is he within the spirit of them: the primary ground of rating to the repair of highways, is the use which the party charged is supposed to make of them, in the enjoyment of his lands, &c. in the parish. In the present case, the rector made no use of the highways, for the purpose of taking or occupying his tithes, for he kept neither team, draught, nor plough. (He was then stopped by the Court.)

Marryat

Marryat and Marriott, contra. The 45th section of the 13 G. 3, c. 78, shews that the ground of rating is not the quantum of use made of the highway, but the value of the property occupied by the party charged. The whole question is, whether the rector be an occupier or not. It has been held, that where he receives an annual composition, it makes no difference that he receives it at two days; that circumstance, then, may be dismissed from the consideration of the Court. Receiving money in lieu of tithes is in the nature of tithes; *Rex v. Lambeth*. (a) *Rex v. Bartlett* (b), shews that the parson has been rated to the poor for tithes which he had let to the occupiers of land. The parson may, therefore, in this instance, be considered as an occupier of the tithes, and, consequently, is liable to pay the rate in question.

1822:
The King
against
The Justices of
Borough
Surrey

ABBOTT C. J. It is manifest, that if we granted a mandamus, commanding the justices to issue a warrant of distress, the rector would bring an action to try the validity of that which we had ordered to be done. I have always felt great reluctance to order any thing to be done by a magistrate which may subject him to an action, of which the issue is doubtful. If the fear of an action appeared to be a mere pretence, and to have no reasonable foundation, we should not listen to it; but here there is so much doubt, that I am of opinion we ought not to grant a mandamus. The 43 *Elix. c. 2* goes much farther than the highway acts; that makes all local visible property liable to be rated, and parsons and vicars are rateable under it *eo nomine*. *Lush v. Moore*

(a) 1 Str. 525.

(b) *Vin. Abr. Poor Rate* (F), pl. 14.

1823.

—
 The King
 against
 The Justices of
 BUCKINGHAM-
 SHIRE.

more than that doubts exist, for I would not prejudice a question which may hereafter be discussed. Whenever such a question shall be brought before us, it will be our duty to decide it. At present I give no judicial opinion upon the point, but think that this rule must be discharged, because I am by no means satisfied that the magistrates would not be rendered liable to an action, by issuing a warrant to distrain for the rate in question.

BAYLEY J. I am of opinion that this case admits of the doubt which has been raised by the magistrates. It does not follow that the parson is liable under the highway act, because he is so under the 43. *Eliz c. 2*. Under the latter he is not liable as occupier; tithes, generally, are not mentioned in that act, although tithes impropriate are. But a parson is rateable to the poor as such. *Rex v. Turner.* (a) In the case of *Rex v. Lambeth*, there was not a letting of the tithes, but a bargain pro hac vice; there may be a great difference between that and a letting from year to year. On account of the great doubts which exist upon this subject, I think that we ought not to grant a mandamus.

Rule discharged. (b)

(a) 1 Str. 77.

(b) *Holroyd and Best* Js. had left the Court.

1829.

PRINTED BY

In 200, 201, &c. of
Thursday, 17th
April 1829.

COCKER against CROMPTON and Others.

TRESPASS for breaking and entering the plaintiff's close, called the *Fold-yard*, situate in the parish of *Prestwick cum Oldham*, in the county of *Lancaster*. Plea, that the said close in the said count mentioned, and in which, &c. now is, and at the said time when, &c. was the close, soil, and freehold of the said defendant *Crompton*; wherefore he, in his own right, and the other defendants, as his servants, broke and entered the same, &c. Replication, that the said close was not the close, soil, and freehold of the said defendant *Crompton*, as alleged. At the trial, before *Holroyd J.*, at the last *Lancaster* assizes, it was proved that the plaintiff was in possession of a close, called the *Fold-yard*, and that a trespass had been there committed; but it appeared that *Crompton* also had a close called the *Fold-yard*, in the same parish; whereupon it was objected for the defendants, that they were at liberty to apply all the evidence to that close, and that the plaintiff must, therefore, be nonsuited. *Holroyd J.* reserved the point, and the plaintiff having obtained a verdict,

In trespass *quare clausum fregit*, where the plaintiff names the close in his declaration, and the defendant pleads *liberum tenementum* generally, without giving any further description of the close, the plaintiff is not driven to a new assignment; but is entitled to recover upon proving a trespass done in a close in his possession bearing the name given in the declaration, although the defendant may have a close in the same parish known by the same name.

Cross Serjt. now moved for a rule nisi to enter a nonsuit. It must be admitted, that, according to an anonymous case in *Dyer's Reports* (a), "If in trespass for breaking a close the defendant plead that the place is six acres of land in *D.*, which are his freehold, and the plaintiff

(a) 23. b. pl. 147.

1823.

COCKER
against
CROMPTON.

reply that they are his freehold, and not the freehold of the defendant; if the plaintiff have six acres in *D.*, and the defendant other six, the defendant cannot give in evidence that he did the trespass in his own land." But in *Goodright v. Rich (a)*, *Lawrence J.* says, "Notwithstanding the case in *Dyer*, according to the modern practice, if the defendant plead *liberum tenementum*, the plaintiff is driven to a new assignment, in which he must specify the close; otherwise, if the defendant prove his title to any land falling within the general description mentioned in the declaration, it is sufficient." And in *Hawke v. Bacon (b)*, the Court use this expression, "This case does not differ from the common case of pleading *liberum tenementum*, where, if the defendant proves that he has a single acre in the vill, the issue is with him, whatever quantity of land the plaintiff may have there." It cannot make any difference that the plaintiff in the present case gave his close a name in the declaration, for the defendant's close was known by the same name.

ABBOTT C. J. I am clearly of opinion that the plaintiff was not bound to new assign in this case. In order to compel him to do that, as a name was given to the close in the declaration, the defendant should have given some further description in his plea.

BAYLEY J. According to the old form of pleading in trespass, the plaintiff did not name his close. Then the defendant gave some name to the close; and if the plaintiff did not new assign, the common bar applied. This is the rule laid down in *Dyer (c)*; afterwards it

(a) 7 T. R. 355.

(b) 2 Tunt. 156.

(c) 23. b.

became

became usual for the plaintiff to name the close in the declaration, and then he may apply his evidence to any close of that name in his possession, and the defendant does not maintain a plea of *liberum tenementum* by shewing that he is the owner of a close of that name. In order to avail himself of such a plea, he must set out the abutments.

1823.

COCKER
against
CROMPTON.

HOLROYD J. The plaintiff in trespass declares upon his possession; and it appears to me, that the question upon the issue was, whether the close, described in the declaration as the plaintiff's, was the defendant's freehold or not. Now, there was evidence that a close of that name, in the plaintiff's possession, was not the freehold of the defendant, and he had no right to substitute another close as the subject-matter of the issue. In the old common bar, the defendant alone gave a name to the close, and then the issue was, whether that close was the defendant's freehold. In the rules of this Court, made in 1654, sec. 12. it is said, "For the avoiding of the common bar and new assignment, the declaration upon an original *quare clausum fregit* may mention the place certainly, and so prevent the use and necessity of the common bar and new-assignment;" and by sec. 16. "The common bar and new-assignment is to be forborne where certainty is contained in the declaration equivalent to a new assignment." I mention these rules to shew what was then considered sufficient certainty in a declaration to prevent the application of the common bar. In the present case, I think, the certainty was such as to prevent the defendant from availing himself of the common bar.

BEST J. concurred.

Rule refused.

1823.

Wednesday,
April 23d.

The KING *against* RICHARD BOWER.

Where a charter directed that out of certain persons to be nominated in a particular mode, "the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the borough for the time being, (they being for that purpose congregated and assembled together,) or the greater part of them as should be so congregated, might, by the greater part of the voices of them so assembled, choose one to be mayor:" Held, that a majority of each definite body must be present in order to make a valid election.

INFORMATION in the nature of quo warranto against the defendant for exercising the office of mayor of the borough and town of *Weymouth-and-Melcombe-regis*, in the county of *Dorset*. The defendant pleaded, that *George* the Third, by his letters patent, under his great seal of the United Kingdom, bearing date, &c. after reciting as therein recited, for himself, his heirs and successors, did will and declare, that the said borough or town from thenceforth should be a free borough and town of itself, and that the mayor, aldermen, bailiffs, burgesses, and commonalty of that borough and town, and also all and singular the burgesses and inhabitants of the same borough and town, by whatsoever name or names they or their predecessors theretofore had been incorporated, and their successors from thenceforth for ever, should be a body corporate, by the name of "The mayor, aldermen, bailiffs, burgesses, and commonalty of the borough and town of *Weymouth-and-Melcombe-regis*, in the county of *Dorset*;" and that from thenceforth there should be within the borough and town aforesaid, one of the burgesses or inhabitants of that town, which should be, and should be named mayor of the borough and town aforesaid; and that also there should be divers men of the borough and town aforesaid, which should be and should be named aldermen of the borough and town aforesaid; and that, likewise, there should be two other men of the borough and town aforesaid, chosen in form thereafter in the said letters patent mentioned,

and

and which should be and should be called bailiffs of the borough and town aforesaid, and that there should be within the borough and town aforesaid twenty-four other men, chosen in form also thereafter in the said letters patent mentioned, which should be and should be called chief and principal burgesses of the borough and town aforesaid, and should be assistant and aidful unto the mayor, aldermen, and bailiffs of the same borough and town for the time being in all causes, affairs, businesses, and matters whatsoever, touching or by any means concerning the borough and town aforesaid. And the said late king did thereby further grant unto the aforesaid mayor, aldermen, bailiffs, burgesses, and commonalty of the borough and town aforesaid, and unto their successors, that the mayor and aldermen of the borough and town aforesaid for the time being, or the greater part of them, of whom he willed the mayor for the time being to be one, should have full power and authority to choose and name, on the feast day of *St. Matthew* the apostle, in every year, in the guildhall of the borough and town aforesaid or in some other convenient place within the borough and town aforesaid, being congregated and assembled together, four of the burgesses or inhabitants of the borough and town aforesaid, whether the same or any of them were or had been aldermen, bailiffs, or principal burgesses or not, out of which four so to be named and chosen, the mayor, aldermen, bailiffs, principal burgesses and other burgesses and inhabitants of the borough and town aforesaid for the time being (they being also for that purpose there upon the same day congregated and assembled together), or the greater part of them as should be so congregated, might and should

1823.

The King
against
Bowen.

1823.

—
The King
against
Bower.

have full power and authority, by the greater part of the voices of them so assembled together, to choose and make one to be the mayor of the borough and town aforesaid, which said letters patent were duly accepted and assented to: the plea then stated, that on the feast day of *St. Matthew* the apostle, that is to say, on the 21st day of *September*, in the second year of the reign of our lord the now king, one *James Willis Weston*, Esq., the then mayor of the said borough and town, and divers, to wit, eight aldermen of the said borough and town, being the greater part of the aldermen of the same borough and town, did duly congregate and assemble together within the guildhall of the borough and town aforesaid, for the purpose of choosing and naming four burgesses or inhabitants of the borough and town aforesaid, to the end that one of such four might be named and chosen mayor of the said borough and town for the year then next following. And the said mayor, and the greater part of the said aldermen of the said borough and town, being so congregated and assembled together as aforesaid, did then and there choose and name the said *Richard Bower*, then being an inhabitant of the said borough and town, and three other inhabitants of the said borough and town for the purpose aforesaid. And the said *Richard Bower* further saith, that on the same day and year last aforesaid, the then mayor of the said borough and town, and certain, to wit, eight aldermen, two bailiffs, twenty principal burgesses, and two hundred other burgesses, and six hundred other inhabitants of the borough and town aforesaid, for the time being, were duly congregated and assembled together, within the guildhall of the borough and town aforesaid, for the purpose

purpose of electing and choosing a mayor for the said borough and town, out of the said four persons so named and chosen as aforesaid; and being so congregated and assembled together as aforesaid, for the purpose last aforesaid, the said then mayor and the greater part of the said aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the said borough and town, so assembled as aforesaid, for the purpose last aforesaid, then and there did chuse and make, elect and appoint him the said *Richard Bower*, then being one of the said four inhabitants so chosen as aforesaid, to be mayor of the said borough and town for the year then next ensuing, and from thenceforth until another mayor should be elected, appointed, and sworn. Replication, that at the time of the said supposed making of the said *Richard Bower*, to be such supposed mayor, as in the said plea mentioned, a majority of twenty-four principal burgesses of the said borough and town were not assembled and congregated together in manner and form as the said *Richard Bower* hath, in and by his said plea in that behalf, alleged; but ten only of such principal burgesses, and no more, by means whereof the said supposed elective assembly, at which the said *Richard Bower* is in and by the said plea supposed to have been made, chosen, elected, and appointed to be such supposed mayor as aforesaid, was not duly constituted, nor was the said *Richard Bower*, at the said time, when, &c. in the said plea in that behalf mentioned, duly made, chosen, elected, or appointed to be mayor of the said borough and town. Demurrer and joinder.

Chitty, in support of the demurrer. The question is, whether the charter set out in the plea does or does not

1828.

—
The King
against
Bower.

1823.

The King
against
Bowen.

require that a majority of each component part of the corporation should be present at the election of the mayor of this borough. The variation in the form of expression used in different parts of the charter, shews that it was not necessary for the majority of each component part to be present. The four burgesses or inhabitants of the borough, out of whom the mayor is to be selected, are to be nominated by the mayor and aldermen, or the greater part of them. That certainly requires the presence of the majority of the aldermen; but then the charter proceeds to say, that "out of the four so to be named, the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants, of the borough for the time being (they being congregated for that purpose) or the greater part of them as shall be so congregated, may and shall have full power, by the greater part of the voices of them so assembled, to choose one to be mayor." That passage does not require that the election should be by the greater part of each of those bodies, but by the greater part "of them as shall be so congregated." The introduction of the latter words distinguishes this case from all that are to be found in the books. It appears to have been the intention of the charter, that after a nomination by a select body, there should be a popular election of a mayor, in which the weight of each vote would be equalized; and that would render it quite unimportant, whether or not a majority of the aldermen or principal burgesses attended to give their votes on that occasion. Besides, if the words "greater part of them," in this part of the charter, are to be applied to any particular body, they must be applied to each component part of the corporation; but the mayor being only one, they
cannot

cannot apply to him, nor can it be supposed that the majority of the inhabitants, who may amount to 5000, are required to be present. The true construction is, that the mayor must be elected by a majority of those present, considering them as forming one mass; and this agrees with the case of *Reg v. Locke (a)*, where the Court said, "If an act to be done be referred to the constituent members of a corporation, nothing can be done but by a majority of those who are the constituent part of the corporation. But where a thing is referred to be done by the commonalty, there the majority of those who are present (all being summoned) will bind the rest."

1823.

The King
against
BOWER.

Adam, contra. The election of the defendant was bad, inasmuch as a majority of the twenty-four principal burgesses did not attend. In *Rex v. Morris (b)*, the election of a mayor of this very corporation was held void, because a majority of the principal burgesses was not present; and that body being reduced to less than one half of its proper number, the corporation was thereby dissolved, not having power to make a legal assembly to fill up the vacancies. Under the new charter granted by the late king, the corporation consists of the same component parts as before; this case must, therefore, be governed by *Rex v. Morris*, unless the words "or greater part of them as shall be so congregated," introduced into the new charter vary the mode of election. By the old charter the election of the mayor was to be determined by the greater part of the voices of them so assembled, and the words now added do not

(a) *Vin. Abr. Corp.* (G 3.) pl. 8.(b) 4 *East*, 17.

1823.

The King
against
Bowen.

at all change the sense of the passage. No doubt the election must be decided by the majority of the mass when assembled, but the corporate body can never be legally assembled, unless a majority of each definite part be present. *Rex v. Miller* (a), *Rex v. Bellringer* (b), *Rex v. Varlo*. (c)

Chitty, in reply. It is reasonable to suppose that, when the new charter was granted, some mode would be given for avoiding the difficulty which had been before experienced, and the words in question, which were not in the old charter granted by *James I.* appear to have been introduced with that view. [*Abbott C. J.* Suppose the number of principal burgesses to be reduced one-half, could there be a good election under this charter?] It would certainly be difficult to establish that there could.

ABBOTT C. J. It has now been for many years an established principle in corporation law, that if an election is to be made by a definite body alone, or by a definite together with an indefinite body, a majority of the definite body must be present. In the latter case it is not, indeed, necessary that the party elected should have the voices of the majority of the definite body, but still they must form a part of the mass. Much good is derived from adhering to general rules; and this rule, as to corporations, is in itself extremely beneficial, as it compels them to fill up, from time to time, the vacancies that occur. It should not, therefore, be broken in upon by nice and subtle construction. Now, the words

(a) 6 T. R. 268.

(b) 4 T. R. 810.

(c) 1 Cowp. 246.

of the charter are, that "the mayor and aldermen shall name four burgesses or inhabitants, and that the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants, (being for that purpose assembled and congregated together,) or the greater part of them as shall be so congregated, shall elect one of the four for mayor." Upon this two things are to be considered: first, Who are to meet? The mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants; according to the general rule, the majority of the principal burgesses (that being a definite body) must meet. Secondly, Who may elect? The majority of the mass. I cannot see any difference between "the greater part of those so congregated," and "a majority of the voices of those so assembled." There is nothing, then, in this charter to take the case out of the general rule, according to which, the election of the defendant was illegal, and judgment of ouster must be pronounced.

BAYLEY J. In *Rex v. Miller* it was established as a rule, that where any thing is to be done by a general assembly of a corporate body, a majority of each definite part of it must be present; and that rule has never been broken in upon. A case of this nature may be taken out of the general rule by the words of the charter. What then are the directions given by the charter in question? That the election shall be by the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants for the time being (they being for that purpose assembled and congregated), or the greater part of them so congregated. *Rex v. Bellringer* is decisive as to the meaning of the words "for the time being,"

1823.

The King
against
BOWEN.

1823.

The KING
against
BOWER.

being," and the words "congregated and assembled" mean so assembled as the law requires, viz. by a majority of each definite body. The argument for the defendant is, that the words "greater part of them as shall be so assembled," narrow the meaning of the former passage, which requires a legal assembly, according to the general rule; but they have no such effect. The majority is to be of those so assembled, that is, assembled as by law is necessary. I am, therefore, of opinion that this is within the principle of *Rex v. Miller* and *Rex v. Morris*; and that if it had been intended by the present charter to alter the general rule of law as to corporation assemblies, more explicit words would have been used to manifest that intention.

HOLROYD and BEST Js. concurred.

Judgment of ouster.

Wednesday,
April 23d.

REX against BELLAMY.

A conviction on the 5 Anne, c. 14. s. 4., for keeping and using a gun to kill game without being qualified, must be made within three months after the offence committed.

A CONVICTION stated, that the defendant within three months now last past, to wit, on 1st September, 1821, not having then lands or tenements, or any other estate of inheritance of the clear yearly value of 100*l.*, or for term of life, &c. negating the qualifications; nor then being game-keeper of any lord or lady of any lordship or manor; nor then being truly and properly a servant of any lord of any lordship or manor; nor then being immediately employed and appointed to take and kill the game for the sole and immediate benefit of such lord;

lord; nor being in any other manner qualified, empowered, licensed, or authorised by the laws of this realm, either to take, kill, or destroy any sort of game whatsoever, did, at, &c. keep and use a gun, being an engine to kill and destroy the game against the form of the statute in that case made and provided, whereby he forfeited, &c. The conviction then set forth a summons of the defendant, his appearance on the 6th *December*; and that a witness examined on the part of the informer, proved the offence to have been committed on the *first* day of *September*, and the conviction was dated the 6th day of *December*, which was more than three months after the offence was committed. The conviction was removed into this court by certiorari, in order that it might be quashed. And now,

1823.

The King
against
BELLAMY.

Adams argued in support of the conviction. A conviction for selling game under the 5 *Ann. c. 14. s. 2.*, must be made within three months after the offence is committed; but this conviction is founded upon the 4th section of that act, in which no time is limited, within which the conviction is to take place. The words "convicted as aforesaid" in that section refer, not to the conviction in the 2d section, but to the preceding words in the 4th section, viz. the justices before whom the conviction is to take place, and the witnesses by whose testimony the offence is to be proved. The case of *Rex v. Tolley (a)* was a conviction on the 9 *Ann. c. 25. s. 1.*, by which the conviction is expressly required to be within the time limited by the second section of the 5 *Ann. c. 14.* It is not, therefore, an authority in point.

(a) 3 *East*, 467.

1823.

—
The King
against
BELLAMY.

Denman, contra. After insisting that the case of *Res v. Tolley* was an authority to shew that the conviction must be made within three months after the offence is committed, was stopped by the Court.

ABBOTT C. J. I am of opinion that a conviction under the 5 *Ann. c. 14. s. 4.*, must take place within three lunar months after the offence is committed. In this case it did not take place within that time, and therefore must be quashed. The language of the acts of parliament upon the subject of game is by no means free from obscurity. It is our duty, however, to give effect to the intention of the legislature, if that can be ascertained. Now I think, that the intention is made manifest in this instance, by the different parts of the act in question, and also the subsequent statute of 9 *Ann. c. 25.* The 5 *Ann. c. 14. s. 2.* enacts, “that if any higler, &c. shall have in his possession any hare, pheasant, &c. or shall buy, sell, or offer to sell any hare, &c.; every such higler, &c. shall, upon every such offence, be carried before a justice of the peace; and upon view, or upon the oath of one or more credible witnesses, shall be convicted of the same, and shall forfeit for every hare, pheasant, &c. 5*l.*, provided that such conviction be made within three months after such offence committed.” The conviction for offences described by that section must, therefore, take place within three months after the offence is committed. The third section only provides for discoverers. Then the fourth section enacts, “that if any person not qualified so to do, shall keep or use any greyhounds, &c. or other engines, to kill game, and shall be convicted thereof, upon the oath of one or two credible witnesses by the justices of the peace where such offence is committed, *as aforesaid*; the person

person so convicted shall forfeit the sum of 5*l.*, one-half to be paid to the informer, and the other half to the poor of the parish where the same was committed; the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of such justice before whom such person shall be *convicted as aforesaid*." The words "*as aforesaid*," are twice used in the fourth section, and in both instances refer to "*convicted*." Now the only mode of conviction before pointed out in the statute, is that mentioned in the second section, and, therefore, by a general reference to that, the fourth section refers as well to the time within which the conviction must take place, as to the other circumstances of it. Indeed no part of the description of the conviction is wanted in the fourth section, but that of the time within which it is to take place, for it expressly describes the justice before whom, and the witnesses upon whose testimony it is to take place. The fourth section then goes on to enact, "that it may be lawful for any lord of a manor to empower his game-keeper to kill game; but if the said game-keeper shall under colour or pretence of the said power and authority to kill, or take the same for the use of such lord, sell and dispose thereof to any person whatsoever, and shall be thereof convicted before any one justice of the peace *as aforesaid*, upon such conviction, such game-keeper shall be committed to the house of correction for the space of three months." Then comes the 9 *Ann. c. 25.* which enacts, "that lords of manors shall appoint but one game-keeper, whose name is to be entered with the clerk of the peace; and in case any other game-keeper whose name shall not be entered as *aforesaid*, who shall not be otherwise qualified by the laws to kill game, shall presume to kill any hare, &c.

1823.

The King
against
BELLAMY.

or

1823
1828.
The King
v. ~~the~~ ~~King~~
Baker
v. ~~the~~ ~~King~~
Baker

or sell or expose to sale any hare, &c., the offender shall for every such offence incur such forfeiture, pains and penalties as are inflicted by the recited act upon higlers, &c. for buying and selling game to be recovered by such means, and in such manner and form, and within such time, and to such uses as are prescribed by the said act. It is reasonable to suppose, that when the legislature in the 9 *Ann.* c. 25. imposed upon game-keepers not duly appointed for killing or selling game, the same penalties as the 5 *Ann.* c. 14. imposed upon higlers, they understood that the offences mentioned in the 5 *Ann.* c. 14. s. 4., were subject to the same limitation of time as those described in the second section. For it would be a singular anomaly if it were necessary that a higler or a game-keeper whose certificate was not duly enrolled, should be convicted within three months after the offence committed; yet, that an unqualified person using a gun to kill game, or a game-keeper selling game without the consent of the lord of the manor by whom he is appointed, might be convicted at any time.

BAYLEY J. I think that the conviction in this case ought to have been made within three lunar months after the offence committed. The information in the case of *Rex v. Tolley* was founded upon the 5 *Ann.* c. 14. s. 4., and, if rightly decided, that is an authority in point. It was the defence and not the charge that depended on the 9 *Ann.* c. 25. The latter statute, however, is explanatory of the former. The second section of the 5 *Ann.* c. 14. directs that, with respect to the offences therein described, the conviction shall take place within three months. Then the fourth section either has no limitation as to time, or, if any, it is subject to that which is prescribed by the second.

second. I think the words "as aforesaid," in the fourth section, do limit the time within which the conviction must take place to three months. They refer to "convicted," and that must mean convicted within the limitations mentioned in the second section, and that conviction is required to take place within three months after the offence committed. The words "convicted as aforesaid," occur twice in this clause, and they must apply to the time within which the conviction is to take place, or they can have no meaning whatever. For the justices before whom, and the witnesses upon whose testimony the conviction is to take place, are expressly mentioned in the clause. For these reasons, I think that the conviction in this case ought to have been made within three months after the offence was committed, and that, not having been made within that time, the conviction must be quashed.

HOLROYD J. I think that the case *Rex v. Tolley* was rightly decided, but that it is not conclusive upon the present case. That charge was founded on the fourth section of the 5 *Ann. c. 14.*; the defence on the 9 *Ann. c. 25.*, viz. that the defendant was a gamekeeper, duly appointed under the provisions of that act. Now that act expressly requires, that where a person, acting as gamekeeper, but who has not complied with the directions of the act, shall be convicted of killing game, &c., the conviction must take place within the time fixed by 5 *Ann. c. 14. s. 2.* If, therefore, the fourth section of the 5 *Ann. c. 14.* were unlimited as to the time within which a conviction might take place, the 9 *Ann. c. 25.* would be a virtual repeal of it in that particular as to gamekeepers. I think, however, that convictions upon 5 *Ann. c. 14. s. 4.*

respect of dwelling-houses, shops, buildings, land, and premises, and the trunks, pipes, and other apparatus for the conveyance of gas belonging to the above-mentioned and being fixed in the ground in the parishes of Birmingham, and the profits thereof within the parish, the annual value being stated at 800*l.* and the assessment 20*l.* Upon appeal against this rate, the sessions confirmed the same, subject to the opinion of this Court in the following case:

By a private act of the 39*th* G. 3., certain persons therein named and their successors, were declared to be a body corporate, by the name of the *Birmingham Gas-light and Coke Company*, and powers were given them "to supply the town with gas, to enter into contracts for the lighting of houses, &c., and with the consent of the commissioners for lighting and paving the town, to break up the soil and pavements of the streets, &c., for the purpose of laying down pipes and other necessary apparatus, for the conveyance of gas from the manufactory to the houses, &c. of the consumers." In pursuance of the provisions of this act, the company purchased the dwelling-houses, shops, buildings, land, and premises mentioned in the assessment, and erected and placed therein retorts, gasometers, purifiers, and other apparatus necessary for the manufacture of gas and coke (part of which apparatus is affixed to the freehold and part is not,) and also by the consent of the aforesaid commissioners, broke up the soil and pavements in the streets, and fixed therein the trunks, pipes, and other apparatus for the conveyance of gas mentioned in the assessment, and which communicate with the house and manufactory. The company carry on a considerable manufactory of coke and gas upon these

THE CASE
The *Birmingham Gas-light and Coke Co.*

CASES IN EASTER TERM

1823.

The King

vs. The Corporation of Birmingham

premises, and derive a profit from the sale of each of those articles. The coke is conveyed from the premises of the company to those of the purchasers, by means of carts and waggons, and the gas by means of the trunks, pipes, and other apparatus for the conveyance of gas, mentioned in the assessment; gas and coke are both manufactured from coal, at a great expense of fuel, and the machinery and apparatus necessary for the manufacture of these articles are also very expensive, and require frequent renewal. *Stock in trade, and the profits of the manufactories in the parish of Birmingham, are not rated to the poor in this rate.* The premises, trunks, pipes, &c. mentioned in the assessment as belonging to the company, if rated to the poor as other lands within the parish, that is to say, if the profits arising from the sale of gas are not included, are worth 200*l.* per annum; but are worth 800*l.*, if the profits arising from the sale of gas are included. If the Court of King's Bench should be of opinion that the profits accruing to the company from the sale of gas are not rateable, or that they can only be rated as the profits of a manufactory, the rate ought to be amended, by inserting the sum of 200*l.* therein, in lieu of the sum of 800*l.*, and the sum of 5*l.* in lieu of the sum of 20*l.*

Clarke, Gurney, Reader, and Holbech. The company are liable to be rated for these buildings, and the trunks and pipes, as the occupiers of the land on which their buildings are situate, and over which their pipes are distributed. *Rex v. The Corporation of Bath (a). Rex*

(a) 14 East, 609.

v. The Company of Proprietors of the Rochdale Water-works. (a) In the latter case the company were held to be rateable, as the occupiers of pipes conveying water. The only difference between that case and this, is, that the pipes here convey gas. In that case Lord Ellenborough says, that it made no difference whether it be a reservoir of so many feet square, or a pipe of so many inches in diameter. Here, the pipes may be considered as warehouses for gas. Secondly, the property is rightly assessed at 800*l.*, which is its value to the company, and the measure of their ability to pay. In *Rex v. Sir Archibald Macdonald* (b), the trustees were assessed for the dues and rates of the *Rochdale* canal lock and tunnel, at 36*l.* 10*s.*; and the case found that the tonnage amounted to the sum charged in the assessment. The objection was, that the rate was for the tolls payable at the lock, under the act of parliament, and that tolls were not rateable: but the Court held the rate to be good; and Lord Ellenborough said, "The Court have only said, that tolls are not rateable *per se*, but only when connected and rated conjunctively with real and substantial property, situated in the parish, which, as yielding profit there by means of the toll, is the proper subject of rating within the statute of *Elizabeth*. Now here, the lock itself is rated, which is something real and substantial, locally situated within the township, and producing profit, and the addition of the dues or rates is merely giving other names for the same thing." The dues constituted the entire profits which the trustees received from the lock; therefore they were rated for

(a) 1 *M. & S.* 634.

(b) 12 *East*, 324.

1823.

The King
v. The Trustees
of the Gas Works
in the Parish of
St. Martin in the
City of London

the profits of the work. Here the trunks and pipes are local property within the parish, and they become more valuable, in consequence of conveying gas. The annual profit which the company derive from them when so used constitutes the value, and is the measure of their ability.

Denman, contra, was stopped by the Court.

ABBOTT C. J. The question proposed to us is not, whether the company be rateable for their buildings above ground, or their pipes under ground, but to what amount they are rateable. I am of opinion, that the amount in respect of which they are rateable, is the sum for which the buildings, trunks, and pipes would let to a person who is willing to carry on the business there. It appears from the statement in the case, that the premises, trunks, and pipes, if rated to the poor as other lands in the parish, that is, if the profits arising from the sale of gas are not included, are worth 200*l.* per annum, but if the profits are included, then they are worth 300*l.* per annum. I am of opinion that the profits are not in this case rateable. If they were, a blacksmith's forge might be rated, not at what it would let for, but at the sum which the blacksmith acquires by it. The distinction between the cases cited and the present, is, that here the profits rated are those of a manufactory which are obtained by applying the skill and industry of man to capital brought from a distance for that purpose. They are very different from the profits of canals or of mineral waters, which are natural products arising within the parish, and rendering the land in which they are situated more valuable.

valuable. For these reasons I am of opinion that the rate must be amended by inserting 200*l.* as the value of the buildings and pipes, and 5*l.* as the sum to be paid.

BAYLEY J. This is really a question of quantum. In most of the cases cited, the question was, whether the property was rateable or not; and though the profits may have been referred to as fixing the quantum, the Court never went into that question. Here the question of quantum is presented to the Court, and a distinction is taken between the value of the land *per se*, and when it is used for the purposes of the trade. I am of opinion that the company ought to be assessed, not at a sum equal to the annual profits of their trade, but at that sum which the buildings, trunks, and pipes would produce to them if let at an annual rent to persons willing to carry on the trade, or that rent which the company would be forced to pay if the premises were not their own property.

HOLROYD J. I am of opinion that the rate ought to be amended, as it is stated that in this parish the profits of other manufactories are not rated. In the case of a canal, the land and the water are rated; and here an attempt is made to rate the pipes and the gas; but that cannot be done. The proper criterion for the rate to be imposed upon these lands and buildings is the rent at which they could be let to a person willing to carry on the business.

BEST J. I think that such a construction ought to be put upon the statute of *Elizabeth* as to include the largest

1823

.511

The King

The King

The King

The King

The King

that the rate ought to be amended by inserting the sum of 200*l.* instead of 800*l.*; and 1*l.* instead of 20*l.*

1823.

Rate amended accordingly.

The King
reginald
The Barons
John Gaslight
and John Co.

MITCHELL against MITCHESON.

A RULE had been obtained by *Tindal*, for quashing the writ of *habeas corpus cum causa* issued in this case, to remove the cause from the sheriff's court of the town and county of *Newcastle-upon-Tyne*. It appeared by the affidavit, that a plaint or action was entered in that court, according to the practice of the court, by the plaintiff against the defendant, on the 18th of *July*, 1822. A certificate of that entry was served on the defendant on the 3d of *August*; common appearance entered for him on the 4th of *December*; and a declaration was then filed. On the 18th of *December* the defendant appeared and pleaded; and on the 29th of *January*, when the cause was about to be heard, the writ of *habeas corpus* was delivered to the sheriff.

A cause cannot be removed from an inferior court by *habeas corpus*, unless the defendant is actually or virtually in custody.

Chitty now shewed cause, on an affidavit, which stated, that the defendant was served with process in the nature of a *capias ad respondendum*, being the same whereupon defendants are arrested and held to bail when an affidavit of the cause of action is made. In *Tidd's Practice*, 399.(a), it is said, that the writ of *habeas corpus* lies where the defendant has been arrested

1823.

10 B. 9
 11 B. 9
 12 B. 9
 13 B. 9
 14 B. 9
 15 B. 9
 16 B. 9
 17 B. 9
 18 B. 9
 19 B. 9
 20 B. 9
 21 B. 9
 22 B. 9
 23 B. 9
 24 B. 9
 25 B. 9
 26 B. 9
 27 B. 9
 28 B. 9
 29 B. 9
 30 B. 9
 31 B. 9
 32 B. 9
 33 B. 9
 34 B. 9
 35 B. 9
 36 B. 9
 37 B. 9
 38 B. 9
 39 B. 9
 40 B. 9
 41 B. 9
 42 B. 9
 43 B. 9
 44 B. 9
 45 B. 9
 46 B. 9
 47 B. 9
 48 B. 9
 49 B. 9
 50 B. 9
 51 B. 9
 52 B. 9
 53 B. 9
 54 B. 9
 55 B. 9
 56 B. 9
 57 B. 9
 58 B. 9
 59 B. 9
 60 B. 9
 61 B. 9
 62 B. 9
 63 B. 9
 64 B. 9
 65 B. 9
 66 B. 9
 67 B. 9
 68 B. 9
 69 B. 9
 70 B. 9
 71 B. 9
 72 B. 9
 73 B. 9
 74 B. 9
 75 B. 9
 76 B. 9
 77 B. 9
 78 B. 9
 79 B. 9
 80 B. 9
 81 B. 9
 82 B. 9
 83 B. 9
 84 B. 9
 85 B. 9
 86 B. 9
 87 B. 9
 88 B. 9
 89 B. 9
 90 B. 9
 91 B. 9
 92 B. 9
 93 B. 9
 94 B. 9
 95 B. 9
 96 B. 9
 97 B. 9
 98 B. 9
 99 B. 9
 100 B. 9

The bargain being made, the sheep were driven by *Lemon* to the house of *Miller*, at *Nyngam*, about nine miles from *Cockchester*. Upon their arrival there, *Miller* prevailed upon *Lemon* to accept a check for 78*l.* upon *Miles* and Co., bankers at *Cockchester*, by assuring him that it was as good as money. *Miller*'s account at the banker's had been overdrawn for some months before this transaction took place. *Lemon* then left the sheep in *Miller*'s possession. *Page*, after keeping the check for two days, presented it at the banker's, and payment was refused. On the very day the sheep were obtained from *Lemon*, *Elizabeth Carver*, who was sister-in-law to *Miller*, went with him to the office of an attorney at *Cockchester*, who was an entire stranger to them, and gave him instructions to prepare a warrant of attorney, which was done accordingly; and, upon that, judgment was entered up and execution issued against *Miller*, under which the sheep in question were taken. *Miller* absconded, and was not afterwards heard of. Upon these facts it was contended, on the part of the defendant, that no property in the sheep was vested in *Miller* by the sale, he having obtained possession of them by fraud. On the part of the plaintiff it was contended, that the property did pass, inasmuch as there was no false representation made to induce *Page* to part with the possession of the sheep; and the case of *Rex v. Lara* was cited (a). The Lord Chief Justice, upon the authority of that case, was of opinion, that the property had passed to *Miller*, and the plaintiff, accordingly, had a verdict for 78*l.* A rule nisi for a new trial having been obtained in last *Michaelmas* term,

(a) 6 T. R. 565.

Scarlet and *Chitty* now shewed cause. By the contract and subsequent delivery, the property in the sheep vested in *Miller*. In the case of a sale upon credit the property vests in the vendee by virtue of the contract. But where the sale is for ready money, it vests in the vendee by delivery. Supposing the servant to have exceeded his authority by receiving the check instead of ready money; yet, if the master adopted the act of his servant, he must be bound by it. Here he did adopt it, for he kept the check from *Wednesday* until *Saturday*. He, therefore, consented to the vendee's having possession of the property sold. If the bankers had failed on the *Friday*, and the vendee had had money in their hands, it is clear that the check would have been a good payment. The master must be taken, therefore, to have given credit to *Miller* from the time he received the check from *Lemon*. If he did not mean to adopt the act of his servant, he should have returned the check immediately; whereas he kept it for two days before it was presented. At all events, after the lapse of so much time, and after the rights of third persons have intervened, *Page* ought not to be allowed to say that the property never vested in *Miller*, into whose possession the sheep were delivered.

Marryat and *Walford*, contra. *Miller* obtained these goods with a pre-conceived design not to pay the price, and to place them in the hands of a particular creditor; and in order to execute his plan, he represented a draft, which he knew to be worth nothing, to be as good as money. He might, therefore, have been indicted under the 30 G.2. c. 34., for obtaining goods by false pretences.

In

1823
 Part of
 the
 original
 will
 of
 the
 testator
 is
 now
 in
 the
 possession
 of
 the
 executor
 of
 the
 will
 of
 the
 testator
 who
 is
 now
 in
 the
 possession
 of
 the
 executor
 of
 the
 will
 of
 the
 testator

and during the holidays of his bill, accepted by *Outthwaite* and *Wharton* Merchants in the habit of exchanging bills, and having been written here, the defendant, *Outthwaite*, knowing himself to be in a distressed circumstance, wrote to *Malcolm*, a merchant in *Glasgow*, stating that *Outthwaite* and *Co.* could not pay their bills, and were not worth a farthing, and that it was necessary for him to go down into *Scotland* and purchase goods, by which means he could stand, and help out one or two of his creditors. He went to *Glasgow*, and there purchased the goods in question of *Cross*, for which he paid by *Outthwaite's* acceptance, and by another bill which *Malcolm* was prevailed on to draw on the plaintiff, in favour of *Cross and Co.* He did not, however, assist either of his creditors. *Gibbs C. J.* thought it was a question for the jury, whether *Cross and Co.* had merely made an improvident sale, or whether the defendant had proved that the plaintiff had fraudulently obtained the goods. If they thought that the plaintiff went down to *Scotland*, having formed a deliberate plan to put off bad bills for valuable merchandises, knowing the goods would never be paid for, and intending then to abscond with the goods, or to throw them into an immediate bankruptcy, or to pass them over to a particularly favoured creditor, he was of opinion that the Plaintiff was guilty of a fraud, and that the sale would not change the property; but if the plaintiff only meant to give these bills, and himself, by these bills, more credit than they deserved, and intended to carry on his business, and to try to pay for the goods at some time or another if he could; that was not such a fraud as would vitiate the sale. The jury found that this was a fraudulent transaction undertaken knowingly, and with intent to defraud *Cross and Co.* of their goods. Afterwards upon motion, the Court would

have

2524.

to be
the
same
as
the
original
bill

contract of purchase, and he is reported to have said further, that the possession was not to be there is no sale. The defendant then a purchaser of the goods, but a person who has tortiously got possession of them. If he knew at the time the bill was worth nothing, I think he is answerable to the plaintiff to the amount of the value of the goods; but this is not the proper remedy. The plaintiff should have brought trover, or an action of deceit. That case shows it to have been the opinion of Lord Ellenborough, that if, at the time when a contract of sale is made, a party, by representing as an available security a bill which he knew to be worth nothing, obtains possession of the goods, he does not thereby acquire any property in them.

ANNO C. J. Upon further consideration we are all of opinion, that there ought to be a new trial. If Miller contracted for and obtained possession of the sheep in question with a preconceived design of not paying for them, that would be such a fraud as would vitiate the sale, and according to the cases which have been cited, would prevent the property from passing to him. Whether he obtained possession of the goods with such a preconceived design, is a question of fact which ought to be left to the jury, and for that purpose the case must go down to a second trial. At the former trial, the cases of *Noble v. Adams*, *Row v. Jackson*, and *Bead v. Hutchinson* were not cited. If the property in the sheep had not passed to Miller, it is clear that the plaintiff was not entitled to the possession of them, against the defendants. For the plaintiff had a right to seize, under the third Statute;

1873.

1873.
 1873.
 1873.
 1873.

**Don't miss
this
new
book**

that the Lord might regard the same in answer.

3 Term. Sep. 1952; and 1953. 1954. 1955. 1956. 1957. 1958. 1959. 1960. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572. 2573. 2574. 2575. 2576. 2577. 2578. 2579. 2580. 2581. 2582. 2583. 2584. 2585. 2586. 2587. 2588. 2589. 2590. 2591. 2592. 2593. 2594. 2595. 2596. 2597. 2598. 2599. 2600. 2601. 2602. 2603. 2604. 2605. 2606. 2607. 2608. 2609. 2610. 2611. 2612. 2613. 2614. 2615. 2616. 2617. 2618. 2619. 2620. 2621. 2622. 2623. 2624. 2625. 2626. 2627. 2628. 2629. 2630. 2631. 2632. 2

by the delivery of his said sword.

misuse to hold the same, with the same blood as

Doe dem. 'Sir EVAN' NEPEAN, Bart., against

T. GODDARD.

... to them to reveal

SUBJECTMENT to recover the possession of a copy

hold tenement situate in the manor of *Loders* and

Bothenhampton, in the county of Dorset. At the trial

before Park J., at the Spring assizes 1892, for that

county, a verdict was found for the plaintiff subject to

the opinion of the Court upon the following case:

¹ The premises in question were a copyhold tenement.

within and parcel of the manor of ~~Eoders~~ and "Bottom

~~Seigniorial~~ and demiseable by 'copy of court roll' of the

said Manor. At a court feet and court baron of 1200

Galway, then lord of the said manor, there held on the

74th day of October, 1788, before John Simms, steward

James Edward Gaddard, who claimed to hold by copyright

court roll of the said manor, dated the 12th day of July

51-78714 for the lives of Henry Davis and Henry Davis, Jr.

Volume: 89, No. 1, one customary message or telephone call.

to take effect upon the death of the person who has been appointed.

of such grant, to take and hold the copyhold tenement, successively, as the

the copyhold tenement, the devise shall take and hold it during the life of the said John, his heirs and assigns forever, and after the death of the said John, the said tenement shall remain to the said John's heirs and assigns forever.

...shall be entitled to receive...

M

with

with the appurtenances in the said manor, in the said manor, and according to the custom of the said manor, and entered into the hands of the lord all the said premises, together with the said copy of court roll, to be cancelled, that the lord might regrant the same in manner hereinafter mentioned. Whereupon, at the said court, came the said *Samuel Goddard*, and retook of the lord, by the delivery of his said steward, the said premises, to hold the same, with the appurtenances to the said *Samuel Goddard*, for the lives of *John Goddard* and *Daniel Goddard* his sons, and the life of the longest liver of them successively, at the will of the lord, according to the custom of the said manor, by the yearly rent of seven shillings and six pence, according to the custom of the said manor, when it should happen, and by all other burthens, works, customs, suits, and services, therefore due and of right accustomed. And for such estate and entry in the said premises so to be had, the said *S. Goddard*, as sole purchaser, gave to the lord a fine of 21*l.*, and so the said *S. Goddard* was admitted tenant thereof, and did his fealty. There is a custom in the manor, that when a copyhold tenement within the same is granted by copy of court roll to any person, to hold the same to such person for the lives of two or more other persons, and the life of the longest liver of such other persons successively, at the will of the lord, according to the custom of the said manor, and the grantee dies during the life or lives of any one or more of such other person or persons, without having devised the said copyhold tenement by his last will and testament, such one or more of such other person or persons so surviving such grantee, shall be entitled, by virtue

CASES IN EASTER TERM

1852.

108 701
115 701
115 701
115 701
115 701
115 701

a special occupant, but, upon the death of tenant *pur auter vie*, the right is in the lord, and cannot be taken out of him without express words for that purpose. The question is not so much, whether such a custom may exist, but whether it can exist coupled with such a grant as this. In *Smartle v. Penhallow* (a), the habendum was to the grantee and "his assigns," that case is, therefore, distinguishable from the present. The case put by Lord *Ellenborough* C. J. in *Right v. Bowden* (b) is also distinguishable, for there the *cestui que vies* were admitted tenants in reversion. [*Bayley* J. The word "successively" in this grant may have some operation.] That word was probably introduced to shew that *S. Goddard* was to hold for the life of the longest liver of the *cestui que vies*, and not for their joint lives only. It has been said, that by custom a copyholder for life may name his successor, but a doubt as to that is expressed in *Gilbert's Tenures*. (c) Now this custom would do more, for it would take the interest out of the lord without any grant. Such a custom would be against common right, and all such customs are bad. (d) *Stevens v. Tyrrell*. (e) The converse of this custom certainly would not be good, viz. that the grantee should hold on for his own life after the death of the *cestui que vies*, *Anon.* (f) There is another objection to this custom; that it is uncertain, for the *cestui que vies* are to take only in the event of the grantee dying without devising the estate. Now, a custom that depends upon the will of another is void, *Com. Dig. Copyhold*. (g) The

(a) 5 Ed. Reym. 904. (b) 5 East, 280.
(c) 328; but see a note on that passage in the 4th edit. by *Watkins*.
(d) *Com. Dig. Copyh.* (S 10.) (e) 2 Wils. 1.
(f) *Moore*, 8. pl. 27. (g) (S 14.)

grantee

grantee may also defeat the cestui que vie by surrendering. If it be said that he cannot so defeat them, it may be questionable whether *Davis* the cestui que vie in the former grant to *S. Goddard* has not a better right to the estate than the present defendant. But a custom to prevent tenant *pur auter vie* from surrendering would be unreasonable, and therefore void. Lastly, the grant is inconsistent with the custom. The words "sole purchaser," introduced into the grant, shew, that the interest was purchased for *S. Goddard* alone, and no one else can take an estate in remainder by virtue of that grant.

C. F. Williams, contra, was stopped by the Court.

ABBOTT C. J. I am clearly of opinion, that the custom stated in this case is good. By a grant to *A.* for the lives of *B.* and *C.*, the grantor professes to part with the estate for those two lives. By the common law, upon the death of the tenant *pur auter vie*, under such a grant of a freehold, there would be a general occupancy. The question, then, is, whether a custom may not extend to copyholds, the rule established by the common law as to freeholds, and give the estate to the cestui que vies for the residue of the time mentioned in the grant, in the event of the grantee dying without having disposed of it by will. I cannot discover any thing unreasonable in such a custom. But it has been argued, that the grant to *S. Goddard* for the life of the defendant is not good, because *Davis*, who was before a cestui que vie, had an interest in the estate, which could not be surrendered. That argument, however, is inapplicable, for that estate was surrendered during the life of *S. Goddard*,

1833.
 ———
 But still
 stands
 against
 Goddard.

And this custom would not begin to operate until his death; it could, therefore, only attach upon that estate which he had at his death, and not upon that which was previously surrendered. Another argument has been founded on the words "successive purchasers." But I take them to mean nothing more than that *St. Goddard* alone paid the fine, so that no other person could, by paying part, have an equitable interest in the estate. The word "successively" in this grant is not, as it appears to me, an idle word. It is applicable to a holding by several, one after another, and would be unnecessary, and indeed unintelligible, if applied to *St. Goddard* alone. For these reasons I think that the custom is good per se, and that there is nothing in the terms of the grant to make it otherwise. The defendant is, therefore, entitled to the estate, and must have a verdict entered in his favour.

BARRY J. If that part of the argument were sustainable, in which it has been attempted to show, that the grantee could not surrender during his life, I should think the custom unreasonable, and therefore void. But the meaning of the custom, as stated, plainly is, that if the grantee shall not, by surrender during his life, or by will, dispose of the estate, then the cestui que vie shall take it; and the word "successively" shews how they are to take it. It is clear, that if a copyhold be given to *A.* and his heirs during the life of *B.*, the heir of *A.* will be a special occupant. But there is no general occupancy of copyholds. Of freeholds there is, by the common law, a general occupancy; and the question is, whether by custom it is extended to copyholds, and whether the same custom may not point out who shall be occupants. In

the case of *Spence v. Aylmer* (a), where the word "assigns" was introduced, the court decided to take as special acceptants, but that word makes no difference, for they took because no assignment had been made; and that the case must be considered as if the word "assigns" had never been introduced. In *Right v. Broughton* (b) the words "heirs and assigns" were not in the grant, in that respect it was similar to the present case. But there no custom existed, and both Lord Ellenborough and Lord Mansfield expressed an opinion that, had there been a custom, the *cestui que vie* would have taken. The word "successively," in this grant, shews the lord's concurrence that the *cestui que vie* should have the estate after the death of S. Goddard. That word is clearly introduced with a view to a succession to the estate, which could not be if it were to revert to the lord at the death of the tenant *pur auter vie*.

PER
——
Robt. Scott.
Mansfield
and
Ellenborough.

MORRIS J. I am of opinion that the custom in question is good and valid in law. The argument as to the power of surrendering is not substantial. The meaning of the custom is, that if the grantee dies while he is a grantee, without devising the estate, then the *cestui que vie* shall take. Now, if he surrenders, he would no longer be in the situation of grantee; and, therefore, the case in which the custom is to operate in favour of the *cestui que vie* would not arise. The only ground on which it can be urged that this custom is bad, is, that it is unreasonable; but that cannot be intensionable which merely effects in copyholds what the common law has established as to freeholds. In the case of a freehold, if the lord granted it, for life, he had nothing left in him

(a) 10 Ves. 403. (b) 5 East, 260.

during

1823.

But see
Hunt v.
Hunt
1823

during that time; and, therefore, at common law, after the death of the grantee, a general occupant might enter; but the case of copyholds is different. For, notwithstanding the grant of a copyhold interest, the freehold in the land remains in the lord; and in respect of that, he may enter; and not in respect of any copyhold interest reverting to him from the grantee. The custom here is merely, that, where the copyhold is granted to one for the lives of others, the same rule shall apply to that as to freeholds; and if the custom may establish an occupancy, no doubt it may also point out who shall be occupants.

But see *Hunt v. Hunt* (1823) 10 B. & C. 101

BEST J. Under this custom the copyholder would no doubt pay for an estate to endure for two lives; it would, therefore, be hard that the lord should take it back again at the expiration of one. A custom to prevent that cannot be unreasonable, particularly as it merely assimilates copyholds to freeholds, as regulated by the common law. It has been argued that the custom is inconsistent with the grant, but that is not so. The grant was to *S. Goddard* for the lives of two other persons; it is therefore clear, that although the interest appears to be given to *S. Goddard* alone, yet the thing granted was not to revert to the lord until after the expiration of the two lives. A custom to dispose of the estate in the mean time is not inconsistent with the grant, but supplies a defect in it. The cases of *Smertle v. Penhallow* and *Right v. Bowden* are decisive. The former is not in principle distinguishable from the present, and in the latter, the Court put this very case as one in which the cestui que vie would take the estate. It has also been urged that the custom is void for uncertainty. If it be uncertain, the common

law

law also is uncertain; for that gives the estate to the heir only in the event of the ancestor not otherwise disposing of it; and this custom gives the estate to the cestui que vie, if the tenant pour autre vie does not devise it away. The objections taken to the custom are therefore invalid, and the defendant is entitled to the estate.

Postea to the defendant.

REX against The Inhabitants of LAKENHEATH.

Saturday,
April 26th.

UPON an appeal against an order of two justices, whereby *H. Bailey*, his wife and family, were removed from the parish of *Chippenham* to the parish of *Lakenheath*, the court of quarter sessions confirmed the order, subject to the opinion of this Court upon the following case:

The pauper was settled by birth in the parish of *Lakenheath*, but he had resided the last seven years in *Chippenham*, under the following circumstances: *Edward Russel*, Earl of *Orford*, by his will, dated the 2d of *August*, 1726, charged his manor of *Chippenham*, and all his lands and hereditaments in *Chippenham*, with the payment of a rent-charge of 20*l.* per annum, to be paid to the trustees therein named, their heirs and assigns for ever, upon trust to be by them paid yearly unto a person to be from time to time nominated by the person who, for the time being, should be entitled to the manor of *Chippenham*, to officiate as a schoolmaster in

The master of a charity-school, who was removable from his office at pleasure, resided for seven years, rent-free, in a house of the annual value of 10*l.*, where other parish school-masters had resided before. Part of the house he undertook to the parish at an annual rent: Held, that this was a coming to settle upon a tenement of the value of 10*l.* per annum within the meaning of the 13 & 14 *Car. 2.*, and that the pauper thereby gained a settlement.

the

the schoolmaster, and he was not to be considered as a tenant of the school-house, his occupation being a mere temporary one as a servant. Now, here, the occupation was a permanent one, for Lord Eldon will not give the house, nor is it necessarily connected with the office. The schoolmaster might have been turned out of the house without vacating the office.

Dover, contra. By coming to settle upon a tenement of the value of 10*l.* per annum, a party becomes irremovable, and a settlement is gained by forty days residence. Now, here, the pauper came to settle upon this tenement, which was of the annual value of 10*l.* The argument on the other side is, that it is necessary that the pauper should not only occupy a tenement for forty days, but that he should have an indefeasible title. But the case of *Rex v. All Saints, Derby* (a) decides that this is not necessary. There it was held, that the pauper's being in possession of the land, and in the permanency of the whole profits, was sufficient. The question is not whether the pauper could have been removed by the trustees, but whether the parish officers had that power. *Rex v. The Inhabitants of Fillongley* (b) is an authority to shew, that the occupation of a house, under the circumstances stated in this case, is a coming to settle upon a tenement within 13 & 14 *Car. 2.* In *Rex v. Chestnut* the pauper occupied as a servant, and not as a tenant; here it is stated that the pauper underlet part of the school-house to the parish of *Chippenden* for an annual rent of 2*l.* 2*s.* Now that is wholly inconsistent with the fact of his occupying as a servant.

(a) 5 M. & S. 90.

(b) 1 T. R. 458.

1831

The King
against
The Inhabit-
ants of
LAKENHEATH

ANDREWS C. J. This case must be governed by the decision in *Rex v. Pilkington*. (a) There the pauper rented a house of the value of 8*l.* per annum, and resided in it three years. With respect to that house there was no question, but about the same time that he took that house his brother gave him a close in an adjoining parish, containing about four acres, saying: "I'll give you a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it." The Court held, that the occupation of the latter close was a coming to settle upon a tenement within the statute, and the two tenements being of the value of 10*l.* per annum, that he gained a settlement. *Ashhurst J.* says, "If the party comes to reside upon a tenement of 10*l.* a-year, he cannot be removed, and then he gains a settlement by forty days' residence." And *Butler J.* considered that the pauper was a tenant at will. This is not like the case of *Rex v. Chesham*, where the pauper occupied as a servant. In such a case, the occupation is that of the master. Here it is found as a fact, that the pauper occupied a house and tenement, of the value of 10*l.* per annum, and it is clear that he occupied in his own right, for he actually underlet part to the parish. I am, therefore, of opinion, that the pauper gained a settlement in the parish of *Chippenham*, and that the order of sessions must be quashed.

BAYLEY J. The occupation of a tenement of the value of 10*l.* per annum for 40 days, although no rent be actually paid, is a coming to settle upon a tenement within

(a) 1 T. R. 458.

the statute, so as to make the party irremovable. Here, indeed, the pauper might be considered to have given his services partly in consideration of his being permitted to reside in the house, and, in that case, the services so rendered would be something in the nature of a rent. At all events, he came to occupy as tenant at will with a view to permanent residence, and that is a coming to settle upon a tenement within the meaning of the statute.

HOLROYD J. I think that the school-master was tenant at will of this house. The legal possession of the house was in him, and not in the lord or receiver of the manor. In the case of master and servant, the servant may merely have the use of the house as servant, but in that case the possession is that of the master, but here the schoolmaster actually underlet a part of the house to the parish, he therefore enjoyed the house as his own, and not as the servant of the lord or receiver of the manor. That being so, I am of opinion, that he gained a settlement in *Chippenham*, and the order of sessions must therefore be quashed.

Order of sessions quashed.

1823
The King
against
The Trustees
of the
Lancashire

1824.

Saturday,
April 26th.

**REX against The Inhabitants of Sutton St. Ed-
munds, in the County of Lincoln.**

A pauper serving a farmer was to have the liberty to feed two cows on his master's farm during a year. They were fed during the summer in the pasture of his master, and in the winter in his straw yard, with hay grown upon his lands. It was found that the keep of the two cows during the summer months required land worth five guineas annually, and to cut hay sufficient for the winter keep required land of the further annual value of five guineas. Held, that the right to feed the two cows upon the pasture during the summer was the only part of the contract which gave any interest in the land, and that the pauper did not thereby gain a settlement, less than 10l.

BY an order of two justices, *Thomas Watson*, his wife and son, were removed from the hamlet of *Leverington Parson Drove*, in the Isle of *Ely*, to the hamlet of *Sutton Saint Edmunds*, in the county of *Lincoln*. Upon appeal, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

The pauper, *T. Watson*, being settled at *Sutton Saint Edmunds*, and having been married several years; at *Lady-day*, 1793, agreed with *John Uhyatt*, a farmer in *Leverington Parson Drove*, to serve him as a confined labourer in husbandry (that is, to work for him and no other person) for a year. The terms of the agreement made between the pauper and his master were as follows. The pauper was to have 18l. a year wages. His master was either to find him two cows, or the pauper was to be at liberty to provide himself with two and feed them on his master's farm during the same year. The pauper went into the service of Mr. *Uhyatt* under the agreement at *Lady-day*, 1793, and continued therein till *Lady-day* 1797, under contracts to the same effect. During the first three years of such servitude, the pauper lived in a house on his master's farm in *Whitcomb High Fen*, and the last year of such servitude, in a cottage at *Leverington Parson Drove*. The occu-

the sessions having found the annual value of the pasture-feed to be

portion

pation of the cottage was incidental to the service of the pauper, who was discharged from it at the same time that he left his service. The pauper bought one cow, and his master found him another, both of which were sold during the summer in the pasture of his master, and in the winter, were kept in the straw-yard of his master, and fed with hay grown upon the master's lands. The pauper had the exclusive use and advantage of such cows. If the pauper had not had such cows kept for him on his master's farm, he would have had more wages; and at the time he left Mr. *Ullatt's* service in 1797, he took his cow with him. Evidence was given to the Court, that the keep of the two cows during the summer months would require two acres and a half of land, on which they were fed; and that such acres were worth together annually, 5*l.* 5*s.*; and that to cut hay sufficient for the winter keep, would require two acres and a half more of such land of the annual value of 5*l.* 5*s.*; and, that the summer feed, and winter keep with hay for the two cows on such farm, were of the annual value of 10*l.* 10*s.* The Court of quarter sessions were of opinion, that the keeping and feeding of the cows under the above circumstances did not constitute such a tenement; as gave the pauper a settlement at *Leverington Parsonage Drove*, and therefore confirmed the order of removal.

Judge, in support of the order of sessions. The right, to feed these cows upon the master's farm does not constitute a tenement of the annual value of 10*l.* within the 13 & 14 *Ch. 2.* In order to constitute a settlement by the right to feed cattle, a right must be acquired under the contract to profits issuing out of land to the annual

1823!

The King
against
Barton &
Emmings

1829.

The King
against
Bryson &c.
Ex parte

value of 10*l*. In *Rex v. Tibbys* (a) Lawrence J. lays it down, that in contracts to feed cows generally, under which they might be fed with green tans brought in the market, would not be a settlement within the statute. Now, in this case the cows were to be fed upon the farm, which must be understood to mean, according to the usual mode of feeding cattle, what is to be pasture fed in summer, and with dry feed in the winter. During the former period, the party entitled to feed his cows upon the land would be taking a portion of the profits of the land amounting in value to 5*l* 5*s* per annum. During the latter period, there is nothing in the terms of the contract to prevent the master's feeding the cows with dry feed, not the produce, and therefore not constituting any part of the profits of the land. If the contract was to feed them in winter with hay cut from that land, it would not give any interest in the land, but would be a mere personal contract. [*Bayley J.* In *Rex v. Oswald Twissell*, Michaelmas term, 1818, this very point was decided. In that case the pauper rented, inter alia, the milk of a cow to be kept by the owner, her keep made up the necessary value, 10*l*, and she was, in fact, pasture fed. But it was held, that as it did not appear to have been the master's bargain that she should be pasture fed, hiring the milk was not necessarily taking a settlement, and the words of the statute allowing the settlement was quashed.] In this case it is not to be considered as a settlement, although it is a right to the produce of the land, as in the case of *Rex v. Phillips*, contra. The case of *Berry v. Miles* (b) is an authority expressly in point; and shows that such a contract is not a settlement, because the contract was not to feed upon the growing produce, but that the party acquired a right to the produce of the land.

181

2 n W

ciously

cisely in the same terms; and it was admitted in argument, that as the cows were to be fed, and were fed on the master's farms, there was a profit-making and of itself to constitute a tenement, and that was found to be above the value of 10*l.* per annum. In that case there was not any express stipulation that the cows should be pastured fed. Besides, here the cows were to be fed upon the farms, which means upon the land, and if so, then the value of the summer and winter feed together exceeded the annual value of 10*l.* It is not necessary that they should feed for the whole year; forty days is sufficient to give the settlement. *cf.* [Hobart J.] The sessions have not found then the right of feeding the two cows on the land was of the annual value of 10*l.* The mode of ascertaining the value of the keep adopted here, at 5*l.* 8*s.* for the summer and 5*l.* 5*s.* for the winter, is as fair as estimating it at a certain sum per week throughout the year.

ANSON C. J. It has been settled, in several cases, that the liberty to take the profits of land by the mouth of cattle is a tenement, within the meaning of the 19*th* of Chas. 2.; but the case of *Rees v. Arnold & Twissell* is an authority to show that the contract must apply to growing produce, and that a contract partly for growing produce and partly for hay, is insufficient to give a settlement. The contract in this case is not very distinguishable from that in *Rees v. Minister*, although it is to be observed, however, that no question was raised in that case as to the spring which the cattle were to be fed. The question was tried, both by the learned judges, as if they were to feed upon the growing produce, and that the plaintiff acquired a right to the profits of the
 1833.
 The Keep
 against
 Rees v. Arnold
 & Twissell

N n 2

land

1822.

The King
against
Barrow &c.
Barrons.

land itself. *Le Blanc J.* says, "the liberty of taking the profits out of land is found to be of a greater value than 10*l.* It was a point conceded in that case, that the mode of feeding was sufficient to give a settlement. Here the distinction is pointed out, and according to the case of *Bar. v. Oswald, Twissell*, the contract must be to feed the cattle with the growing produce of the land. Now in this case the master was only bound, by the terms of the contract, to feed the cattle during the year, upon the farm, according to the usual mode, that is, to feed them during the summer upon the pasture, and during the winter in the straw yard. The summer keep upon the pasture is found to be of no greater value than five guineas, and the winter keep, for the reasons already given, cannot be taken into consideration, and that being so, I am of opinion, that the pauper did not gain any settlement in *Leavington Parson Drove*."

BARRETT J. The party, in order to gain a settlement, must come to settle upon a tenement of the yearly value of 10*l.* The right to take the herbage and produce of the soil is a right to the profits of the land, and constitutes a tenement. But the contract must be for taking the growing produce of the land. Now here it is stated, that by the terms of the contract, the pauper was to be at liberty to feed the cows on his master's farm during the year. By that contract the master would be bound to feed the cows during the whole year in the usual manner, viz. to feed them on the pastures during the summer, and in the straw yard during the winter. The right to feed cattle for a period of the year when they are usually pasture-fed, by eating the growing produce of the land, is a tenement; but the right to feed cattle by dry food

food not necessarily a part of the produce of any particular land, is not a tenement. That point was not taken in *Rex v. Minister, Re Oswald Thistle* is an authority expressly to shew that the value of the pasturage can alone be taken into consideration in estimating the value of the tenement occupied by a pauper under such a contract as this. Here, the value of the pasturage alone amounted only to 5*l.* 5*s.*; and consequently the pauper had not a tenement of the annual value of 10*l.*

Messrs J. I am of opinion that the pauper gained no settlement by this contract. Agreements for liberty to take the growing produce of land by the mouths of cattle, have been considered as equivalent to a demise of the land, at a rent equal to the profits of the land, and to constitute an incorporeal tenement. The party entitled to the privilege is considered for this purpose as the occupier of land of that value. The authorities establish that, where such a contract confers a right of pasturage of the annual value of 10*l.*, a settlement is gained. But a contract to feed cattle with hay in a straw yard, gives no right to the occupation of the land from which the hay is cut. It is rather a personal contract for the sale of so much hay as shall be necessary for the sustenance of the cattle. Here then the pauper had an interest in that land alone on which his cows were depastured during the summer, and the annual value of that was only 5*l.* 5*s.* and insufficient. For these reasons I am of opinion, that the pauper did not gain any settlement in *Leccington Parson Drove*.

Order of Sessions affirmed.

1828

*Reg. v. The Inhabitants of Berkswell, Decr. 2 22 April 1828**Saturday,
April 26th.***REX against The Inhabitants of BERKSWELL.**

The lord of a manor granted a lease of a cottage for thirty-one years to A., who resided in it above a year, and died, leaving a widow and three daughters.

Administration was granted to the widow, but no distribution of the estate was made. After his death, the widow, and, by her permission, one of the daughters and her husband resided in it some years: Held, that the daughter, or her husband in her right, had not any equitable estate in the cottage, and that no settlement was gained by their residence in it.

TWO justices, by their order, removed J. Matthews, his wife and children, from the parish of *Berkswell*, in the county of *Warwick*, to the parish of the *Holy Trinity*, in the city of *Coventry* and county of the same city. The sessions, upon appeal, quashed the order, subject to the opinion of this Court on the following case:

Previous to the residence at the parish of *Berkswell* the pauper was settled in the parish of the *Holy Trinity*, the appellant parish. In the year 1808, a lease for thirty-one years was granted by the lady of the manor, under the provisions of an inclosure act, to one *Hands*, of a cottage situate in the parish of *Berkswell*, at the annual rent of one shilling. *Hands* was residing in the cottage at the time of the lease, and continued to do so afterwards for upwards of a year, when he died intestate, leaving a widow and three daughters, one of whom was married to the pauper. Letters of administration were granted to the widow, but no distribution was made of the intestate's effects. After the death of *Hands*, his widow lived in the cottage for about two years and upwards. One of the other daughters, with her husband, resided there for two or three years more, and then the pauper and his wife came, and resided there for some years, and until the period of their removal, with the permission of the widow, she occasionally helping them, and always paying the annual rent of one shilling, reserved by the lease. The pauper never paid

paid any rent, either to the widow or the lady of the manor. The question for the opinion of this Court was, whether, by such residence, the pauper gained a settlement in the parish of *Berkswell*.

1825.

The King
v. The Trustees
of the
Berkswell
Parish.

Scarlett and Reader, in support of the order of sessions. It is an undisputed principle of law, that if a party, being irremovable, resides in a parish for forty days, he thereby gains a settlement; and it is equally clear, that if he resides on his own property he is irremovable. Then the only question is, whether the pauper had an interest in this property. It must be presumed that the lease for thirty-one years was a beneficial lease, and the pauper's wife had a right to reside upon the property, if, by consent of the parties, no sale of it took place; and it has been held that an equitable estate is sufficient to confer a settlement. *Rex v. Cold Ashton*. (a) *Rex v. Noland*. (b) And it makes no difference whether that estate be in the pauper or his wife. *Rex v. Offchurch*. (c) There, certainly, the wife was a cestui que trust; but the effect must be the same whether the interest be given by devise or by the statute of distributions.

Nolan (with whom were *Halbeck* and *Goulburn*), contra. In this case the legal interest was in the widow of *Hands*, the lessee. She might have obtained a settlement by residing on the property in question; but no one else could. [He was then stopped by the Court.]

(a) *Bar. 3. C. 447.* (b) *11. 750.* (c) *3. 11. 144.*
The pauper never
brought

1825.

The King
against
The Inhabitants of
Buckswell.

ABBOTT C. J. I am clearly of opinion, that the pauper had not any such interest as would have enabled him to say, "I will come and reside on this property." If the widow of *Hands* had refused to let him do so, a court of equity would not have assisted him. The next of kin had not even an equitable interest; but had a mere right to an account, and, perhaps, upon that it might have turned out that the widow had paid debts to a greater amount than the value of the leasehold property in question. The order of sessions must, therefore, be quashed.

BAYLEY J. The case of *Rex v. Toddington* (a) is decisive. Lord *Ellenborough's* judgment, there, shews in what cases an equitable interest will give a pauper a right to come and reside upon the property. This clearly is not such a case, even supposing the pauper's wife to have had any equitable interest.

HOLROYD J. concurred.

Order of Sessions quashed. (b)

(a) 1 B. & A. 560.

(b) See *Rex v. Widworthy*, Burr. S. C. 109. *Rex v. Stanton*, 2 M. & S. 461.

1823.

The KING *against* The Company of Proprietors
of the TRENT and MERSEY Navigation.

BY a rate or assessment made in October 1818, for the relief of the poor of the township of *Finden*, in the county of *Derby*, the *Trent and Mersey Canal Company* were rated in the sum of 4s. 11½d., as proprietors and occupiers of a canal and towing paths, in respect of 7 acres of land. And upon appeal against this rate, on the ground that they were not the occupiers, nor had any rateable property in the said township of *Finden*, the sessions confirmed the rate, subject to the opinion of this Court on the following case.

By an act of the 6 G. 3. the company were empowered to purchase land to them, and their successors and assigns, for the purpose of making a navigable cut or canal from the river *Trent* to the river *Mersey*, and were authorised to take for tonnage and wharfage for all goods which should be conveyed upon the canal, such rates and duties as the company should think fit, not exceeding the sum of one penny half-penny per mile for every ton of such goods, to be paid to such persons at such places near to the said cut or canal, as the canal company should appoint; and all persons were to have free liberty to navigate with boats upon the canal (under certain regulations,) upon payment of such rates and duties. A part of the canal, being in length about one mile and fifty-two yards, comprising the quantity of land for which the appellants were rated, passed through the township of *Finden*. The company

had

The proprietors of an inland navigation were rated to the relief of the poor for a certain number of acres of land within the township occupied by their canal, and were assessed in respect of that land at a sum not exceeding that which they actually received for the passage of goods over that part of the canal situate within the township: Held, that this rate was good.

1823.

The King
against
The Proprietors
of the TANK
and MENARY
Navigation.

had no lands, houses, warehouses, wharfs, or other property in the township, except the canal and towing path. No tolls, rates, or duties were received in the township; nor did any tolls, rates, or duties become payable there, the company not having so appointed. But the company received annually a much larger sum than that in respect of which they were assessed for tolls for the passage of goods over that part of their canal which lies in the township of Finden. The company derive very considerable annual profits from the canal.

Clarke, Balguy, and N. R. Clarke, were to have argued in support of the order of sessions; but

Scarlett (with whom was Reader) admitted the rate to be good, inasmuch as the company were rated for a certain number of acres of land situate within the township, producing an annual profit exceeding the sum in respect of which they were assessed.

Order of Sessions affirmed.

REX against SUSANNAH PALMER.

The proprietors of an inland navigation are rateable to the relief of the poor in every parish through which the navigation passes, as occupiers of the land situate in each parish, used for the purpose of the navigation; and, therefore, where the proprietors of such a navigation, which extended through different parishes, were rated in one for the entire amount of their tolls, this Court held that the rate could not be supported.

BY a rate or assessment made by the overseers, churchwardens, and others, of the parish of *Fornham All Saints*, for the relief of the poor, *Susannah Palmer* was charged in the sum of 12. 0s. 10d. for a wharf and buildings situate in *Fornham All Saints*, situate in the parish of *Fornham All Saints*, in the county of Norfolk.

ni one school over has since and to had and has high
modest joining

joining the river *Lark*, and occupied and used for the purposes of navigation of the said river, and the towing paths, locks, sluices, and other works within the parish of *Fornham All Saints*, also occupied and used for that purpose, and the tolls arising therefrom due at *Fornham All Saints*, rated at 250*l*. Upon appeal the sessions confirmed the rate, subject to the opinion of this Court on the following case.

By an act 11 & 12 W. 3. c. 1., *H. Ashley, Esqr.*, his heirs and assigns were empowered to make navigable the river *Lark*, alias *Burn*, from a place called *Long Common*, a little below *Mildenhall* mill, to *Bury Saint Edmunds*; and after making satisfaction to the land owner, *Ashley* was to have and enjoy the cuts, water-courses, towing paths, &c. in as ample and beneficial a manner as if the same by good title and sufficient conveyance in the law had been absolutely sold and conveyed to him, his heirs and assigns. By another section *Ashley*, his heirs and assigns, were empowered to demand and receive for the freight of goods up the river from *Mildenhall* mill to *Bury*, or down the river from *Bury* to *Mildenhall* mill, at such place adjoining the river, as he, his heirs, or assigns should think fit, certain tolls or rates therein mentioned, and a proportionate rate or toll for any less distance. Mr. *Ashley* the original undertaker, from whom the defendant derives her title, made the river navigable from *Mildenhall* to *Fornham All Saints*, a distance of twelve miles and a half. But it was never made navigable as far as *Bury*, nor beyond *Fornham All Saints* and *Fornham Saint Martin*. Half the channel (to the centre thereof) being in the former, and half in the latter parish, but the towing path and the half of one sluice and two locks are in *Fornham*

1823.

The King
against
Railton.

1823.

The King
against
PALMER.

Fornham All Saints, the remaining half of the same sluice and locks being in *Fornham Saint Martin*. The towing path is separated from the adjoining lands by a ditch. The appellant is not an inhabitant of *Fornham All Saints*, but resides in *Wey*. She is the owner under a distinct title of a wharf or coal-yard, of about four acres, lying in the former parish, and adjoining to and situated at the extremity of the navigation, in which said wharf are several warehouses and other buildings, different portions of this wharf or coal-yard are from time to time allotted by the agent of the appellant to the principal coal merchants who use this navigation, to the number of 14 or 15. They pay no rent for these portions, but keep the division fences of their respective portions in repair. These different portions are varied from time to time by the agent of the appellant. Large quantities of coals are carted at once from the boats, and not deposited in the coal-yard; but it is necessary for the accommodation of the wholesale dealers using the navigation, that they should have a place whereon to deposit their goods, but the appellant is not bound to provide such place. The buildings and the out-fences and walls, enclosing the wharf and the towing paths, locks, and sluices, are repaired by the appellant, and were erected by her or her ancestors. Up to the year 1816, the appellant was rated on a rental of 17*l.* for the coal-yard, and no rate was imposed upon the profits of the navigation. The annual value of the coal-yard as mere land, is not above 3*l.* Since the year 1816, to the making of the assessment appealed against, she has been rated in the parish of *Fornham All Saints*, "for tolls arising from the navigation and warehouses," at 250*l.* per annum. The tolls becoming due, and received by the appellant for goods

goods landed in the parish of *Fornham All Saints*, equal the amount of the assessment.

1823.

The King
against
PALMER.

Denman and *Tindal*, in support of the rate, relied upon the cases *Rex v. The Aire and Calder Navigation* (a), *Rex v. Page* (b), *Rex v. The Proprietors of the Staffordshire and Worcestershire Canal* (c), as authorities to shew, that tolls of a navigation were rateable in the parish where they become due. It is true that in the late case of *Rex v. Milton* (d), where a river navigation extended through several parishes, and certain tonnage dues became payable, in respect of goods carried along the line of navigation, and landed at a wharf locally situate within one parish, this Court held that a rate on the proprietor of those dues, for their whole amount, in that parish, stated to be for river tonnage, could not be considered as a rate upon that part of the river locally situate within that parish, but as a rate upon the parts of the river situate as well within as without the parish; and that it could not, therefore, be supported. That case is not distinguishable in principle from the present; but it is at variance with all the early authorities, which fully establish the position, that the tolls of a navigation are rateable in the parish where they become due.

ANDREW C. J. I entertain the greatest reverence for the opinion of the learned judges who decided those cases. It must be recollected, however, that when those cases came before the Court, it had not been decided

that tolls of a navigation were rateable in the parish where they become due.

(a) 3 T. R. 340. (b) 3 B. & A. 112. (c) 3 B. & A. 112. (d) 3 B. & A. 112.

that

1808.

*The King
against
PALMER*

that tolls per se were not rateable. That is now fully established by the case of *Rea v. Nicholson*. (a) The proprietors of a navigation are, therefore, rateable only as the occupiers of the canal, or land covered with water, for their tolls, as profits arising out of that land so used. They are, rateable, therefore, in every parish through which the canal passes, in respect of their land there situate, and so used for the canal. The true principle of rateability in this case is, that the land is taken out of the relief of the poor in the parish where it is unproductive of profit to the proprietor, and is proportionate to that profit, which may be considered as an immoderate advantage received by the proprietor for the use of his land within the parish. This is very different from the case of a sluice. In that case the tolls become due for the use of the sluice itself, and the proprietor must contribute to the relief of the poor in that parish where the sluice is situate. The proprietor of a navigation is to contribute in respect of the profits of land, extending probably through many parishes; and he is to pay to each of those parishes in respect of his land locally situate within it. Here, the whole land occupied by the canal contributes to produce the entire amount of the tolls, and the proprietor of the navigation ought not to have been assessed at that amount in any one of the parishes through which the canal passes. The rate, therefore, cannot be supported, and the order of sessions must be quashed.

Order of Sessions quashed.
The navigation extends from Greenwich inwards to river Thames through several parishes, and many towns of Gooders. It annually passes through that parish, to and from different places of destination: (a) 12 East. 330.

1823.

REX ^{vs} **against** The Earl of PORTMORE and
Another.

DEFENDANTS were rated, as proprietors of the river *Wey*, at 32*l*. 10*s*. being at the rate of 2*s*. in the pound, upon the supposed amount of the tolls earned within the parish. By an act of 22 & 23 Car. 2., for settling and preserving the navigation of the river *Wey*, in the county of *Surrey*, the soil of the riverside of the banks, &c., and the locks, &c., were vested in certain persons in the said act specified, to be used and navigated by them only, their heirs and assigns, and their agents and servants, and not by any other person or persons, boat or boats, barge or vessel whatsoever, without their leave and licence. The defendants are the present proprietors of the said river and navigation, and liable as such to be rated in respect thereof. They are not themselves carriers upon the said river, nor the owners of any vessels navigated thereon, but every vessel navigated thereon is so navigated by their leave and licence, which is uniformly granted, subject to the provisions of certain rules made in pursuance of the act of parliament. By these rules the persons licensed to navigate any vessel upon the river, are required to pay to the receivers appointed by the proprietors of the navigation, a certain *riverage* for every ton of goods navigated on the same. The navigation extends from *Guildford* in *Surrey* to the river *Thames*, through several parishes, and among others the parish of *Woking*, and many tons of goods annually pass through that parish, to and fro, in vessels using the navigation to different places of destination;

The proprietors of a navigation extending through several parishes are to be rated in an intermediate parish, not in respect of the riverage becoming due in that parish for goods landed there, but in respect of the profits of the land used for the navigation situate within the parish.

but

1823.

The King
against
The Earl of
Portland.

but the goods annually landed within the parish do not yield riverage to the amount in respect of which the defendants are assessed. The question for the opinion of the Court was, whether the proprietors of the navigation were rateable, except upon the amount of the riverage arising from the goods landed within the parish. If they were not rateable beyond that amount, then the rate is to be amended, by reducing it to £; otherwise to stand at its present amount.

Monro against the order of sessions, being called upon by the Court, stated that he was prepared to have argued that the proprietors ought to have been assessed only in respect of the amount of the riverage arising from goods landed within this parish, on the ground that they could only be rated for their tolls at the places where they became due; and he referred to the opinion of Lord *Ellenborough* in *Rex v. Sculcoates* (a), and the other authorities cited in *Rex v. Palmer*. He admitted, however, that, according to the principle laid down in the preceding case, the proprietors were liable to be rated in *Woking* in respect of the profits of their land, situate within that parish; and if so, that the riverage payable on goods landed there would not be the correct measure of those profits.

Marryat, *Cowley*, and *Mangles* were to have argued in support of the rate.

Order of Sessions confirmed. (b)

(a) 12 East, 45.

(b) The ground on which all the earlier cases respecting the rateability of canal tolls proceed is this, that the rate is laid upon the tolls themselves; that they cannot be rated till they have an actual existence, or, in other words, till they are actually earned; and that they are not earned till the voyage is completed in respect of which they are payable. When
once

once it was decided that the tolls themselves were not the subject of the rate, the whole of this reasoning became inapplicable; and the only question was, whether the land out of which the tolls arose was rateable; and no reason has ever been assigned for the contrary, except the difficulty of imposing a just assessment. (See 4 T. R. 26. 547., and 3 T. R. 349.) There seems indeed no satisfactory reason for holding that land which, by being applied to a particular purpose, produces a greater profit than it would have done if employed in the ordinary manner, should not be rateable in respect of such profit, whilst a house is rateable for the additional value arising from the circumstance of its containing a billiard table or a machine. *Rex v. St. Nicholas, Gloucester, Guild*, 232. *Rex v. Hogg*, Ib. 266.; or from certain privileges attached to it, as that of selling liquor therein. *Rex v. Bradford*, 4 M. & S. 517., which are profits at least as extrinsic of the house as the tolls are of the land,

1823.

—
The King
against
The Earl of
Pembroke.

1823.

Where the
servant of an
ambassador
did not reside
in his master's
house, but
rented and
lived in an-
other, part of
which he let in
lodgings: Held,
that his goods
in that house
not being ne-
cessary for the
convenience
of the ambas-
sador, were
liable to be dis-
trained for poor
rates.

to his excellency in some Ambassy-street, which is at-
tached to the house of the ambassador, and as such had
received a key from the ambassador, by which he had
but the plaintiff's goods in the house of the ambassador's no use.

NOVELL against TOPSON

TRESPASS for breaking and entering the plaintiff's
house, and distraining his goods. Plea, not guilty.
At the trial before Abbott C. J., at the Midland-sittings
after last Easter term, a verdict was found for the Plain-
tiff, subject to the opinion of the Court, upon the fol-
lowing case:

The plaintiff, who was a British-born subject, from
the 5th of January to the 5th of July, 1821, rented
and occupied a house in the parish of St. James, West-
minster, and let part thereof in lodgings. The plaintiff
continued in the occupation of the house on the 13th
day of September, 1821. The defendant was collector of
the poor-rate for the parish at the time of issuing the
warrant, and making the distress hereinafter mentioned.
The defendant being such collector, on the 13th day
of September, 1821, entered the plaintiff's house and
distrained his goods, under a warrant, regularly signed
and sealed by two magistrates. The rate on which
the distress was founded was duly made, allowed, and
published. The sum distrained for was due, in re-
spect of the said house, for half a year, from the 5th
of January to the 5th of July, 1821, and the same was
regularly demanded from the plaintiff, and payment re-
fused before the distress was made. The plaintiff, for
the last twenty-five years, had been in the service of the
ambassador from the crown of Portugal (to his late ma-
jesty, King George the Third, and his present majesty,
King George the Fourth) as first chorister in the chapel

1823.
~~NOTICE~~
~~OF~~
~~THE~~
~~COURT~~

c. 12, s. 3., whereby it was declared, "That all writs and processes that should at any time thereafter be sued forth or prosecuted, whereby the person of any ambassador or other public minister of any foreign prince or state, authorised and received as such by her majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador or other public minister, might be arrested or imprisoned, or his or their goods or chattels might be distrained, seized, or attached, should be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever." The history of the statute and the principles of the law of nations on which it is founded, are stated in 1 *Bl. Comm.* 254. *Vattel*, b. 4. c. 19. s. 120., c. 7. s. 104., and c. 8. s. 114. Two questions arise for the consideration of the Court, first, whether the plaintiff is a domestic servant of an ambassador; secondly, whether the warrant of distress, issued against the plaintiff's goods, is such process as to come within the meaning of the act. As to the first question, it is quite clear, upon the facts stated in the case, that the plaintiff was a domestic servant of the *Portuguese* ambassador. Suppose him to have been a native of *Portugal*, that he had come over with the ambassador, that he had lived in his house, and that his sole employment had consisted in the performance of those services which the case states him to have performed; undoubtedly, under such circumstances, he would have been considered a domestic servant of the ambassador. The functions of the plaintiff are such as if duly exercised will entitle him to the privilege claimed. No distinction can be made between a chaplain and a chorister, for it is found as a fact, that the service of the plaintiff was necessary in the latter capacity,

capacity, for the due celebration of divine service in the ambassador's chapel. Then, is the case varied by the other circumstances that are stated? It makes no difference that the plaintiff is not a native of the ambassador's country, for it has been held, that the privilege extends to the natives of the country to which the ambassador is sent. *Vattel*, b. 4. c. 19. s. 124., dict. per Lord Mansfield in *Lockwood v. Coysgarne*. (a). Nor is the case altered by a residence out of the ambassador's house, for it may not be large enough to accommodate all his suite. *Widmore v. Alvarez* (b), *Darling v. Atkins*. (c) The teaching of languages could not deprive the plaintiff of his privilege, he did that only when not employed for the ambassador; and as to letting lodgings, that might happen to the ambassador's secretary, yet it cannot be contended that he is not protected. The only exception in the 7th of *Ann*, of employments consistent with the service of the ambassador, is of traders within the description of any of the statutes against bankrupts; but the plaintiff does not fall within that description. In *Triquet v. Bath* (d) the *English* secretary of an ambassador was held to be a domestic servant, and the process issued against him was set aside; and the same was decided in *Evans v. Higgs* (e), *Hopkins v. De Ro-beck* (f), in which latter case it was said by the Court that the words "domestic and domestic servant" were only put for examples in the statute. It has also been held, that bonâ fide service, as domestic physician to an ambassador, would entitle the party to protection. *Lockwood v. Dr. Coysgarne*. Can it be doubted that

(a) 3 Burr. 1676.

(c) 3 Wils. 33.

(e) 2 Str. 797.

(b) 2 Str. 797. Fing. 200. S. C.

(d) 3 Burr. 1478. 1 W. Bl. 471.

(f) 3 T. R. 79.

1808.]

Not a case
against
Tombard

this manner of distress was "process whereby the goods of a domestic servant, or an ambassador's agent, might be distrained?" In no case hitherto determined has any distinction been taken between persons and goods; and the only question has been, whether the party applying was the domestic servant of an ambassador. (Then, in *Lockwood v. Cuyugarc* the process was a *fi. fa.* and although the execution was set aside on other grounds, it was not even suggested, that process against the goods was not within the meaning of the statute; and the same observation applies to *Fountain v. Hayle*. (a))

E. Lawes contra. The privilege in question has never been extended to the goods of an ambassador's servant. Nor, is there in the law of nations any thing to protect the goods of servants. Even the ambassador is not protected as to all his goods, viz. if brought over for the purposes of trade. *Vattel*, b. 4. c. 8. s. 114. And it is quite clear, that the law of nations does not extend the privilege to any goods but those which belong to the embassy. In the present case, the dignity of the ambassador could not be injured by taking goods which did not belong to the embassy, so that no insult would be offered to the state whence he came, and no breach of the law of nations was committed. Now the 7 Ann. c. 12. was merely declaratory of the law of nations; nothing, therefore, can fall within it which does not constitute a breach of that law. *Kattel*, in the passage cited for the plaintiff, b. 4. c. 9. s. 120. is manifestly speaking of the persons of the ambassador's household; his observations are confined to them, and cannot by

(a) 5 Burr. 1751.

any considerable construction be applied to their goods. Grotius de jure belli et pacis, A. 2. c. 16. §. "delegationum jure," A. 8. has this passage which is adopted by Alley, A. 2. c. 10. §. 18. "Comites quique et vasa legatorum an gloriæ immunitatem habent," and in section 9. "Bona quoque legati mobilia et res preinde habentur personæ accessis, pignori dantur: et ad solutionem debiti expi non possunt, nec per judiciorum ordinem, nec quid quidam volunt, manu regis velius est. Nam omnis constitutio abente a legato debet, tam quæ res et necessarias quam quæ personam tangit, quæ plena ei sit securitas." There is not in those passages, a single syllable relating to any goods but those of the embassy, there is not even an allusion to the goods of the ambassador's servants. *Bynkershoek*, "De foro legatorum," c. 15. "de comitibus legatorum," speaks only of their personal immunity, and not of any privilege extended to their goods; and afterwards speaking of the wives of ambassadors, he says, "Uxores cum maxime inter legatorum comites numerandæ;" and after citing several authorities, he adds, "unde nec bona earum recte arresto detinentur, si detenta aliquando fuerint." *Bynkershoek* then, by expressly mentioning the goods of the wife, makes a distinction between her and the rest of "comites" as to that privilege. *Wagenaar*, in his office of ambassador, c. 28., puts a query, whether the ambassador's goods and furniture are not in some instances liable to an execution, as, for instance, for the rent of his house, &c. *Lockwood v. Dr. Cuyegans*, and *Maintainier v. Heyle*, do not by any means establish that the goods are protected. If those cases are authorities for any purpose in the present case, they are in favour of the defendant, for the decision of the Court was against

1808.

 No. 1111
 of the
 Treasury

1823.

of *Norris*
Highgate
Toscoth.

the privilege upon other grounds. The question as to the protection of goods was not agitated, and the same may be said of *Delvalle v. Plomer*. (a) But, even if the Court should think that the goods of an ambassador's servant are privileged, still it is very doubtful whether the service in this case was such as to bring the plaintiff within the statute of *Ann. Triquet v. Bath, Evans v. Higgs, and Hopkins v. De Robeck*, decided nothing more than that the statute is not confined to menial servants. It cannot be collected from any of them that service at the ambassador's house is unnecessary, and unless that be held, the plaintiff cannot have judgment in this case. *Seacombe v. Bowling* (b), *Malachi Carolina's case* (c), *Poitier v. Crowe* (d), *Heathfield v. Chilton* (e), shew that the contrary opinion has prevailed. Besides this, plaintiff had another engagement incompatible with the situation of a domestic servant to the *Portuguese* ambassador. The case states, that he was engaged as prompter at the Opera-house, without any reservation of liberty to absent himself when his service to the ambassador required it. *Masters v. Manby* (f) and *Darling v. Atkins* (g) shew that this objection is decisive. Lastly, in *Viveash v. Becker* (h), Lord *Ellenborough* says, that there cannot be any great mischief likely to ensue from the personal restraint of the principal, if his functions may be delegated to another. There is no reason for supposing that the functions of the plaintiff could not be delegated to another, and therefore, it is not clear that his person is free from

(a) 5 Comp. 47.

(c) 1 Wils. 78.

(e) 4 Burr. 2016.

(g) 5 Wils. 33.

(b) 1 Wils. 20.

(d) 1 Bl. 48.

(f) 1 Burr. 401.

(h) 5 M. & S. 289.

arrest; a fortiori, then, his goods, must be liable to a distress.

1822.

Nov 10
Inquest
Deceased.

Campbell, in reply. This is the first time, that any attempt has been made, to establish, that, the privilege conferred upon the person of an ambassador's servant does not equally apply to his goods. All the foreign writers who have been cited, first state what are the privileges of the ambassador, and then go on to say, that the "comites-legatorum" shall enjoy the same privileges. It is, however, unnecessary to resort to them, the words of the 7 Ann. c. 12. s. 3. being decisive. "All writs, &c. whereby the person of any ambassador or his domestic servant may be arrested, or his, or *their* goods or chattels may be distrained, shall be void." The word *their* must necessarily include the servants. If any other construction be put upon it, the portfolio of a secretary containing the ambassador's dispatches may be seized. It is clear, that this objection was never thought of in *Lockwood v. Dr. Coysgarne*, or *Delvalle v. Plomer*, for it would have disposed of them at once, and the latter would never have been left to the jury on a question of fact had the law been clearly against the plaintiff. As to the nature of the service in *Poitier v. Crona*, *Lockwood v. Coysgarne*, *Fontinier v. Heyl*, *Darling v. Atkins*, *Masters v. Manby*, *Seasomb v. Bowling*, *Malachi Carolina's case*, and *Heathfield v. Chilton*, the service would have entitled the servant to the privilege claimed, had it been actually and bona fide performed, but in each of them it was disallowed on the ground of fraud, and on that ground only. Now, the service performed by the plaintiff was an important one, being necessary to some of the most solemn ordinances of the Roman Catholic

1833

Narrative
against
Treason.

Catholic religion, and unless the plaintiff be privileged as he claims, the ambassador's chaplain may be arrested when he is proceeding to minister at the altar.

ABBOTT C. J. This was an action for breaking and entering the plaintiff's house, and seizing and distraining his goods. The defendant's case rested upon a warrant to distrain for the non-payment of poor-rates. It is found by the case, that the plaintiff is a *British-born* subject; that he occupied a house, of which he let out a part in lodgings; that he was a teacher of languages, and prompter at the Opera-house. My opinion is founded upon one point only, viz. that the action is for taking the plaintiff's goods, and not for arresting his person; as to which, I give no opinion. The question arises upon an act of parliament, framed in very general terms, "That all writs and processes, whereby the person of any ambassador, or other public minister of any foreign prince or state, authorised and received as such, or the domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be utterly void." The expression is certainly large, but the act itself was only declaratory and in confirmation of the common law. It must, therefore, be construed according to the common law, of which the law of nations must be deemed a part. Adopting this rule of construction, I am of opinion, that whatever is necessary to the convenience of an ambassador, as connected with his rank, his duties, and his religion, ought to be protected; but that an exemption from the burthens borne by other *British* subjects ought not to be granted, in a case to which

which the reason of the exemption does not apply. I do not say that the servant must reside in the ambassador's house. I do not say that he may not have an house fit and convenient for his situation as the servant of an ambassador, nor that the furniture in such an house will not be privileged. But the facts of this case are widely different from those which I have mentioned. In this instance, the servant let a part of the house in lodgings. Such an house was not necessary for the personal convenience of the plaintiff; and, therefore, could not be necessary for that of the ambassador, his master. If we should decide that the privilege given by the law of nations extends to such a case as this, every servant of an ambassador might take a large house, for the purpose of letting it out in lodgings, and enjoy an exemption from the payment of taxes. Such a privilege is absurd in itself, and not at all within the reason upon which the rights of ambassadors are founded. I am very sure that it cannot be the wish of any ambassador that his servant should, by colour of those rights, inhabit such an house for such purposes, without contributing to the public taxes of the country where he resides. And I think that there is nothing in the law of nations, or the statute of the 7 Ann. c. 12., which entitles the plaintiff to recover in this action. Judgment of nonsuit must, therefore, be entered.

BAYLEY J. This is not the case of an arrest of the person of an ambassador's servant, nor are the goods seized such as were necessary in a residence of that description which the plaintiff's service to the ambassador required. The plaintiff's counsel claims an unrestrained exemption

1822

NOTICE
against
Taxes

.1823.

NOVELLO
against
Toscocon.

exemption of all goods, without entering into the question of their being necessary or not. The consequence of such a doctrine would be to enable the servant to abuse that privilege which was intended for the ambassador's convenience and not his own. Notwithstanding our decision in favour of the defendant, the plaintiff will still be able to execute all the necessary functions of his office. For these reasons, I concur in thinking that the plaintiff is not entitled to recover:

HOLROYD J. I am of opinion that the plaintiff is not privileged under the circumstances of this case. It is contended, that, by serving the ambassador, he is entitled to an unqualified exemption of all his goods from seizure for taxes or otherwise. Even supposing him to be a domestic servant, he cannot have a privilege to that extent. The privilege is conferred by the law of nations, in order that the ambassador may not be prejudiced in his dignity or personal comfort; it is not given for the benefit of the servant. If the debt for which the seizure was made had arisen out of the plaintiff's situation, as servant to an ambassador, the result of this case might have been different. But that was not so, nor can the ambassador be at all prejudiced by that which has been done. The reason of the privilege, then, does not apply in this instance; the plaintiff, therefore, cannot have the benefit of it, and judgment of nonsuit must be pronounced.

Judgment of nonsuit.

1823.

The KING against Sir JOHN FENTON BOUGHEY,
Bart. and ROBERT FISHER, Gent., Lord and
Steward of the Manor of MERE and FORTON.

Wednesday,
April 30th.

MANDAMUS, reciting, that, at a customary court, holden for the manor of *Meer* and *Forton*, November 23d, 1821, *John Booker* and *Mary* his wife attended for the purpose of making a surrender of a piece of copyhold land, of and within the said manor, then lately sold by the said *J. Booker* to one *Robert Stewart*, who also attended the said court, to obtain admittance thereto, according to the custom of the manor; and that the lord and steward refused to receive the surrender, and grant admittance to *Stewart*; commanded the lord and steward of the manor to hold a customary court for the manor, and receive a surrender from *J. Booker* and *Mary* his wife, of the said piece of copyhold land, and grant admittance thereto to *Stewart*, according to the custom of the manor. The return by the lord and steward set out the following custom: that if any person, not before being a customary tenant, or not dwelling within the manor, shall take any estate as a purchaser, by surrender or other-

Mandamus to the lord and steward of a manor to hold a court, and accept a surrender of a piece of copyhold land from *A.* and his wife, and admit *B.* Return, that there is a custom within the manor, that if any person, not before being a customary tenant, or not being resident within the manor, takes any interest, as a purchaser by surrender or otherwise, of any lands, &c. within the manor, he shall pay for his fine on admission, as he and the lord can agree, which is usually assessed at two years' value;

but persons already being customary tenants or resident within the manor, pay another and a smaller fine to the lord upon so taking any such interest; that *B.*, having purchased the equity of redemption of a customary estate of considerable value, afterwards and before he was admitted to that estate, purchased the land in question, being a small customary estate, in order to be admitted to that first, and so elude the payment of the larger fine, whenever he should apply to be admitted to the larger estate, and by that means to defraud the lord of his said fine. Upon exceptions: Held, that the return was bad, for that *B.* might lawfully make such second purchase in order to avail himself of the custom in favour of tenants of the manor.

Semble. That if the second purchase were fraudulent, still the purchaser would be entitled to admittance, but would not be thereby enabled to avail himself of the custom.

wise,

1823.

The King
 vs.
 Bouvier.

wise, of any lands or tenements, customary within the manor, that then he shall pay for his fine unto the lord of the manor for the time being, as the lord and he can agree; and that the custom has been to assess such fine at the full amount of two years' actual value of the estate; and that persons being customary tenants of the manor have paid another and smaller fine unto the lord of the manor for the time being on such admission. It then set out the following facts. Before the 22d of September last, and before the holding of the customary court for the manor as in the writ mentioned, and the attending of *J. Booker* and *Mary* his wife, and *Stewart*, at the court, *Stewart* had become the purchaser of the equity of redemption of certain customary lands and tenements within the manor, such equity of redemption being previous to and at the time of the purchase thereof by *Stewart*, the interest of one *W. S. Littler*; *Stewart*, on or about the 22d of September last, and before the holding of the said court, in the said writ mentioned, caused a notice in writing to be served on *Sir J. Penton Boughey*, whereby (after reciting that he the said *R. Stewart* had purchased the interest of *Littler* in certain lands and tenements, copyhold of the said manor, comprised in a surrender made and passed at a court held for the manor, on the 8th day of October, 1811, by *Littler*, to *M. Mountford* and *A. Mountford*, subject to a proviso for redemption and resurrender of the premises, on payment by *Littler*, or his assigns, on the 25th day of March, 1822, or any subsequent 25th of March, during his life, on six months' previous notice, of 500*l.* to *M. Mountford* and *A. Mountford*, their executors, &c.) he gave

gave notice that he intended to pay off the said sum of 300*l.* on the 25th day of *March*, 1822, in pursuance of the above condition. At the time of *Stewart's* making such purchase of the interest of *Littler* in the said messuages, lands, &c., as stated in the notice, *Stewart* was not a tenant of the manor, or dwelling within the same, and hath not at any time since become such tenant, or been dwelling within the manor, and the customary lands, &c. referred to in the notice, are of the annual value of 234*l.*, and in case *Stewart* should pay off the said sum of 300*l.*, not being a customary tenant, and not dwelling within the manor, should take an interest as a purchaser, by surrender or otherwise, of the last-mentioned lands, &c., he would be liable to pay a fine upon his admission, according to the custom above set forth. The piece of copyhold land in the writ mentioned, as having been sold by the said *Booker* to *Stewart*, is of very small extent, being in extent less than half an acre of land, and of very small annual value. *Stewart* purchased the said piece of copyhold land in the said writ mentioned, from *J. Booker*, after the purchase made by him of the interest of *Littler*, in the said lands and tenements stated in his said notice, in order that he (*Stewart*) might be admitted to the said piece of copyhold land, according to the custom of the manor, and might, by such admittance, become a customary tenant of the manor, before he should take, by surrender or otherwise, the customary lands and tenements mentioned in the notice of him the said *Stewart*, and for the purpose thereby of avoiding or eluding the payment of the fine which would become due to the lord of the

1823.

A suit
The King
against
BOUGHBY.

1822.
 T. 1. 1822
 Easter
 Return

the manor, by virtue of the customs above set forth, whenever he should, not being a customary tenant, or not dwelling within the manor, should take the rent of the customary lands and tenements mentioned in his notice, as a purchaser by bargain or otherwise, and should be admitted to the same, and of depriving and defrauding the lord of the fine, payable according to the custom.

Patterson took five objections to the return. First, that when *R. Stewart* applied to be admitted to the smaller tenement, the lord had, and still has, a complete tenant to the larger tenement. Secondly, that it does not appear that there is any custom compelling the purchaser of several tenements to be admitted to them in the order in which the purchases were made. Thirdly, that the interest which *R. Stewart* purchased in the larger tenement, was merely an option to repurchase it, contingent upon *Little's* living till the 25th of March, 1822; therefore, at the time of his applying to be admitted to the smaller tenement, it was impossible for him to be admitted to the larger, or to know whether he ever could be admitted to it. Fourthly, that at all events *Stewart* was entitled to be admitted to the smaller tenement; and the question is merely as to the quantum of fine which he ought to pay, in case he should hereafter be admitted to the larger tenement, which is the proper subject of an action after such admittance. Lastly, that *Stewart* is entitled to bring himself within the custom by any mode in his power, and to be admitted or not admitted to any tenement which he may have purchased, without regard to the lord's fine.

As

As to the first objection, the case of *Rees v. Lord of the Manor of Henden* (a) is decisive. The Court there said: "All the lord has a right to acquire, is to have a tenant, and here he had one during the whole time." So in the present case, the lord by his own showing has the *Mountfords* for tenants, and cannot, therefore, compel any one else to come in. An heir may be compelled to come in, but then the lord has no tenant. So a surrenderer may by special custom be compelled to be admitted, *King v. Dillistoe* (b); but no such custom is stated on this return, nor has any surrender been made by the *Mountfords*. The second objection is clear upon the face of the return, for unless there be a custom to restrain him, the purchaser of several customary tenements has a right to be admitted to them in any order that he pleases, and therefore a return, that the party had purchased another tenement before the one in question, but not shewing such a custom, is no answer to the writ. As to the third objection, it must be collected from the return, that the *Mountfords*, to whom *Littler* had mortgaged, were admitted to the larger tenement, and then *Littler* would have no estate which he could surrender, for an equity of redemption cannot be surrendered, *King v. King and Another*. (c) Nor had *Littler* or *Stewart* a right to pay off the mortgage before the 25th. of March, 1822: the *Mountfords* might have refused to receive it before that time. It was, therefore, quite uncertain whether *Stewart* would ever be in a situation to claim admittance, for *Littler's* contingent

1822
The
The
Return

(a) 2 T. B. 464.

(b) 5 Mod. 231.

(c) 5 P. W. 300.

1883.
 The King
 v. Stewart
 Boscawen.
 (2ND S.)

interest could not be surrendered, *Doe v. Tomkins* (a), and the latter might have died before Stewart could be in a position to compel the *Mantfords* to surrender. But, fourthly, Stewart was at all events entitled to be admitted to the estate which he purchased of *Booker*, and if upon a subsequent application to be admitted to the tenement purchased of *Little*, it could be shown that the former transaction was fraudulent, he might still be liable to the larger fine. But the question as to the amount of the fine does not arise here, for no fine at all is due until after admittance, *Rex v. Lord of the Manor of Hendon* (b), *Graham v. Sime* (c), *Hobart's case*. (d) Lastly, there is not any pretence for imputing fraud in this case. There is a custom in the manor, that customary tenants shall be admitted to any tenements which they purchase, upon payment of a smaller fine than other persons, and Stewart has openly and fairly endeavoured to avail himself of that custom which by law he may do. It is admitted that the purchase from *Booker* was a bonâ fide purchase, for the return does not state any thing to the contrary. (He was then stopped by the Court.)

W. E. Taunton contra. The cases cited on the other side do not apply to the present. The return is, for the purposes of this argument, admitted to be true, and the return charges fraud. It states that Stewart purchased the piece of land in question from *Booker*, in order that he might become a customary tenant of the manor before he should take by surrender or otherwise, the lands pur-

(a) 11 East, 185.

(b) 2 T. R. 484.

(c) 1 East, 632.

(d) 4 Co. 37. a.

chased of *Littler*. It charges, that he did that for the purpose of thereby avoiding and eluding the payment of the fine, which would become due to the lord of the said manor by virtue of the custom above set forth, whenever *Stewart*, not being a customary tenant, should claim to be admitted to those lands, and of depriving and defrauding the said lord of the fine, payable according to the custom. The return, therefore, expressly charges fraud, and the party may bring an action for a false return if that charge is groundless. It is also material to observe, that *Stewart* actually gave notice to the lord, that he meant, at a certain time, to pay off the mortgage upon the estate which he purchased of *Littler*; which clearly shews, that the small estate was purchased for the purpose of eluding the fine, which would otherwise have been payable for the other.

ABBOTT C. J. I am of opinion that this return is insufficient in law. It appears that there is a custom within the manor, that if any person not being a customary tenant takes any estate as a purchaser, by surrender or otherwise, of any lands or tenements customary within the said manor, he pays a certain fine; but if he so takes such estate, being a customary tenant, he pays a much smaller fine. The lord contends that no person, intending to purchase and be admitted to a large estate can bring himself within the custom by first purchasing a smaller; and the return charges that Mr. *Stewart*, under such circumstances, purchased the smaller estate for the purpose of defrauding the lord. It is, however, for us to decide, whether or not the circumstances disclosed in the re-

1823:

Printed by
T. & A. K. New
and
Beverly.

1838/

Y. K. S.
A. S. S.
M. S. S.

turn constitutes fraud in law. I use by no means prepared to say that they do; it may always be a question whether the purchase of the smaller tenants be or be not bona fide, but that is a question of fact. If the return had stated that the smaller purchase was colourable, I should have thought that we ought not to assist the party by this prerogative writ, for then he would be endeavouring to avail himself of the custom without being really and truly a customary tenant of the manor. But upon this return, it must be taken that the purchase from *Booker* was a bona fide transaction, the party has done all he that can to make himself really a customary tenant of the manor; I cannot then say that this is any fraud in law, and a peremptory mandamus must be awarded.

BAYLEY J. I am of opinion that this is a bad return. The mandamus directed the lord and steward of the manor in question to accept a surrender from *Booker* and his wife, and admit *Stewart*. Until the surrender and admittance were complete, the surrenderors would remain tenants, and, as such, would be liable to various burthens. They, therefore, had a right to insist upon the acceptance of their surrender, and the admittance of the surrenderee. The writ is resisted on the ground of fraud in *Stewart*, but no fraud in law is alleged. It is true that the return charges fraud, but then it sets out the circumstances which are supposed to constitute the fraud, and they show that the term is used in an improper sense. It appears from the facts stated, that a party who had contracted for the equity of redemption of a customary estate meant at a future time to purchase

purchase the legal estate, and entitle himself to be admitted to hold in the mean time he might mightfully obtain a smaller estate, in order to assail himself of the custom in favour of customary tenants of the manor. It will always be in question, whether the purchase of the smaller estate be fraudulent or not; but that relates only to the purchase, and not to the object with which it is made. If the purchase be merely colourable, it is fraudulent; but nothing of that kind being stated, I cannot say that there is any fraud in the present case. But, even admitting that the second purchase were fraudulent, it is by no means clear, that the return would be sufficient; for then, when the party applied for admittance to the larger estate, the lord might demand the same fine that would have been payable if the second purchase had not been made, because fraud cannot assist the party committing it. But at all events, as the surrender is quite free from suspicion, and nothing amounting to a fraud on *Stewart's* part is stated in the return, I think that it must be quashed, and that a peremptory mandamus must issue.

HOLROYD J. This return is insufficient in point of law. The mandamus issued at the instance not only of *Stewart* but also of *Booker* and his wife. If the parties are attempting to commit a fraud, the whole transaction is void, but no fraud is suggested as to *Booker*, and therefore the mandamus should go not only to compel the acceptance of the surrender, but also to admit *Stewart*; for until admittance the estate is not completely taken out of the surrenderor. If the lord can shew fraud on the part of *Stewart*, he may perhaps,

1828.

THE KING
vs
STEWART
1828
1001
1002
1003
1004
1005
1006
1007
1008
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1880
1881
1882
1883
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1900
1901
1902
1903
1904
1905
1906
1907
1908
1909
1910
1911
1912
1913
1914
1915
1916
1917
1918
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025
2026
2027
2028
2029
2030
2031
2032
2033
2034
2035
2036
2037
2038
2039
2040
2041
2042
2043
2044
2045
2046
2047
2048
2049
2050
2051
2052
2053
2054
2055
2056
2057
2058
2059
2060
2061
2062
2063
2064
2065
2066
2067
2068
2069
2070
2071
2072
2073
2074
2075
2076
2077
2078
2079
2080
2081
2082
2083
2084
2085
2086
2087
2088
2089
2090
2091
2092
2093
2094
2095
2096
2097
2098
2099
2100
2101
2102
2103
2104
2105
2106
2107
2108
2109
2110
2111
2112
2113
2114
2115
2116
2117
2118
2119
2120
2121
2122
2123
2124
2125
2126
2127
2128
2129
2130
2131
2132
2133
2134
2135
2136
2137
2138
2139
2140
2141
2142
2143
2144
2145
2146
2147
2148
2149
2150
2151
2152
2153
2154
2155
2156
2157
2158
2159
2160
2161
2162
2163
2164
2165
2166
2167
2168
2169
2170
2171
2172
2173
2174
2175
2176
2177
2178
2179
2180
2181
2182
2183
2184
2185
2186
2187
2188
2189
2190
2191
2192
2193
2194
2195
2196
2197
2198
2199
2200
2201
2202
2203
2204
2205
2206
2207
2208
2209
2210
2211
2212
2213
2214
2215
2216
2217
2218
2219
2220
2221
2222
2223
2224
2225
2226
2227
2228
2229
2230
2231
2232
2233
2234
2235
2236
2237
2238
2239
2240
2241
2242
2243
2244
2245
2246
2247
2248
2249
2250
2251
2252
2253
2254
2255
2256
2257
2258
2259
2260
2261
2262
2263
2264
2265
2266
2267
2268
2269
2270
2271
2272
2273
2274
2275
2276
2277
2278
2279
2280
2281
2282
2283
2284
2285
2286
2287
2288
2289
2290
2291
2292
2293
2294
2295
2296
2297
2298
2299
2300
2301
2302
2303
2304
2305
2306
2307
2308
2309
2310
2311
2312
2313
2314
2315
2316
2317
2318
2319
2320
2321
2322
2323
2324
2325
2326
2327
2328
2329
2330
2331
2332
2333
2334
2335
2336
2337
2338
2339
2340
2341
2342
2343
2344
2345
2346
2347
2348
2349
2350
2351
2352
2353
2354
2355
2356
2357
2358
2359
2360
2361
2362
2363
2364
2365
2366
2367
2368
2369
2370
2371
2372
2373
2374
2375
2376
2377
2378
2379
2380
2381
2382
2383
2384
2385
2386
2387
2388
2389
2390
2391
2392
2393
2394
2395
2396
2397
2398
2399
2400
2401
2402
2403
2404
2405
2406
2407
2408
2409
2410
2411
2412
2413
2414
2415
2416
2417
2418
2419
2420
2421
2422
2423
2424
2425
2426
2427
2428
2429
2430
2431
2432
2433
2434
2435
2436
2437
2438
2439
2440
2441
2442
2443
2444
2445
2446
2447
2448
2449
2450
2451
2452
2453
2454
2455
2456
2457
2458
2459
2460
2461
2462
2463
2464
2465
2466
2467
2468
2469
2470
2471
2472
2473
2474
2475
2476
2477
2478
2479
2480
2481
2482
2483
2484
2485
2486
2487
2488
2489
2490
2491
2492
2493
2494
2495
2496
2497
2498
2499
2500
2501
2502
2503
2504
2505
2506
2507
2508
2509
2510
2511
2512
2513
2514
2515
2516
2517
2518
2519
2520
2521
2522
2523
2524
2525
2526
2527
2528
2529
2530
2531
2532
2533
2534
2535
2536
2537
2538
2539
2540
2541
2542
2543
2544
2545
2546
2547
2548
2549
2550
2551
2552
2553
2554
2555
2556
2557
2558
2559
2560
2561
2562
2563
2564
2565
2566
2567
2568
2569
2570
2571
2572
2573
2574
2575
2576
2577
2578
2579
2580
2581
2582
2583
2584
2585
2586
2587
2588
2589
2590
2591
2592
2593
2594
2595
2596
2597
2598
2599
2600
2601
2602
2603
2604
2605
2606
2607
2608
2609
2610
2611
2612
2613
2614
2615
2616
2617
2618
2619
2620
2621
2622
2623
2624
2625
2626
2627
2628
2629
2630
2631
2632
2633
2634
2635
2636
2637
2638
2639
2640
2641
2642
2643
2644
2645
2646
2647
2648
2649
2650
2651
2652
2653
2654
2655
2656
2657
2658
2659
2660
2661
2662
2663
2664
2665
2666
2667
2668
2669
2670
2671
2672
2673
2674
2675
2676
2677
2678
2679
2680
2681
2682
2683
2684
2685
2686
2687
2688
2689
2690
2691
2692
2693
2694
2695
2696
2697
2698
2699
2700
2701
2702
2703
2704
2705
2706
2707
2708
2709
2710
2711
2712
2713
2714
2715
2716
2717
2718
2719
2720
2721
2722
2723
2724
2725
2726
2727
2728
2729
2730
2731
2732
2733
2734
2735
2736
2737
2738
2739
2740
2741
2742
2743
2744
2745
2746
2747
2748
2749
2750
2751
2752
2753
2754
2755
2756
2757
2758
2759
2760
2761
2762
2763
2764
2765
2766
2767
2768
2769
2770
2771
2772
2773
2774
2775
2776
2777
2778
2779
2780
2781
2782
2783
2784
2785
2786
2787
2788
2789
2790
2791
2792
2793
2794
2795
2796
2797
2798
2799
2800
2801
2802
2803
2804
2805
2806
2807
2808
2809
2810
2811
2812
2813
2814
2815
2816
2817
2818
2819
2820
2821
2822
2823
2824
2825
2826
2827
2828
2829
2830
2831
2832
2833
2834
2835
2836
2837
2838
2839
2840
2841
2842
2843
2844
2845
2846
2847
2848
2849
2850
2851
2852
2853
2854
2855
2856
2857
2858
2859
2860
2861
2862
2863
2864
2865
2866
2867
2868
2869
2870
2871
2872
2873
2874
2875
2876
2877
2878
2879
2880
2881
2882
2883
2884
2885
2886
2887
2888
2889
2890
2891
2892
2893
2894
2895
2896
2897
2898
2899
2900
2901
2902
2903
2904
2905
2906
2907
2908
2909
2910
2911
2912
2913
2914
2915
2916
2917
2918
2919
2920
2921
2922
2923
2924
2925
2926
2927
2928
2929
2930
2931
2932
2933
2934
2935
2936
2937
2938
2939
2940
2941
2942
2943
2944
2945
2946
2947
2948
2949
2950
2951
2952
2953
2954
2955
2956
2957
2958
2959
2960
2961
2962
2963
2964
2965
2966
2967
2968
2969
2970
2971
2972
2973
2974
2975
2976
2977
2978
2979
2980
2981
2982
2983
2984
2985
2986
2987
2988
2989
2990
2991
2992
2993
2994
2995
2996
2997
2998
2999
3000
3001
3002
3003
3004
3005
3006
3007
3008
3009
3010
3011
3012
3013
3014
3015
3016
3017
3018
3019
3020
3021
3022
3023
3024
3025
3026
3027
3028
3029
3030
3031
3032
3033
3034
3035
3

mistress leave to go into another service, to which she consented, saying "she was not against it, if he could better himself." He did not mention where he was going. The pauper went to one *Jenkinson's*, in the parish of *Rees*, and hired himself to him for a year, at 34. 10s. wages. He returned and told his mistress, who said, "Very well; she was not against it." In a few days he went to his new place, and in about a fortnight returned to his old mistress for his clothes, who said, "she hoped he liked his new place," and he said "he did." Under these circumstances he lived with *Jenkinson*, in the parish of *Rees*, three months.

1823.
The King
George
The Queen
The Prince
The Princess
The Duke
The Duchess
The Earl
The Countess
The Baron
The Baroness
The Viscount
The Viscountess
The Marquis
The Marchioness
The Duke
The Duchess
The Earl
The Countess
The Baron
The Baroness
The Viscount
The Viscountess
The Marquis
The Marchioness

Nolan in support of the order of sessions. The service with *Jenkinson* was without the assent of the mistress of the apprentice to the particular service, and therefore no settlement was gained under it. In the first instance, she only consented generally to the pauper's going into another service, and after he had entered into that service, she merely said she was not against it. Now it is clear, that that does not amount to a particular consent to the service with the second master, which is necessary in order to make it by construction of law a service with the first. *Rex v. Inhabitants of Crediton.* (a)

Gurney contra. That case was decided on the ground, that the sessions had found as a fact, that there was no particular assent of the original master to the subsequent service; but in this case the facts are different.

(a) 1 East, 59.

1893.
The *Mary*
service
The *Mary*
of
the *Mary*

for there is first a general licence, then, after the pauper had made an engagement with a new master, there is an express assent to the service with the new master. The case of *Rex v. The Inhabitants of St. Peter (a)* is very like the present. *Abbott C.J.* There the new master took the pauper as the apprentice of the former master. The question in all cases has been, whether there has been a particular assent to the service with the second master. *Rex v. St. Mary Lambeth (b)*, *Rex v. The Holy Trinity in the Minories (c)*

Per Curiam. The question in this case is, whether the service with *Jenkinson* was a service under the indenture. It is clear that the justices have thought that it was not; because they have confirmed the order of removal. They have not said so in express terms, for then there could be no argument upon the subject before us; but they have left it to us to say, whether the conclusion they have come to was right or wrong. We are clearly of opinion, that their decision was right. Much subtlety has been introduced into this branch of the law, of which some of the cases cited furnish examples. Of late the Courts have inclined to decide these questions upon plain principles. In this case, it is impossible to say that the pauper served *Jenkinson* as an apprentice under the indenture. It does not appear that *Jenkinson* even knew that the pauper was an apprentice. It appears that *Mrs. Dutton* had consented to the pauper's going into another service generally; but then he had not mentioned to her where he was going. Afterwards, when he had hired himself to

(a) 1 East, 73.

(b) 2 Bott. 451.

(c) 3 T. R. 605.

Jenkinson, he returned and took his mistress; but Jenkinson's name was not even then mentioned. She did not dissent from it; but there was no express consent to that particular service. It has been urged, that the subsequent assent of the first master is sufficient to make the second service a service under the indenture; but the contrary is established by *Rex v. St. Helen's, Stone Gate*. (a) Besides, under these circumstances, the service to Jenkinson was under a contract of yearly hiring. The pauper served under that contract as a servant, and not under the indenture as an apprentice; and very different duties result, on both sides, from these different descriptions of service. The case of *Rex v. The Inhabitants of Ashby de la Zouch* (b) is strongly in point with the present. The want of knowledge in the second master, and the hiring of the pauper as a servant, are common to both cases; and those facts distinguish this from most of the cases cited in argument. For these reasons, we are of opinion that the service with the second master was not a service under the indenture, and, consequently, that the order of sessions is right.

Order of Sessions affirmed.

(a) 1 East, 285.

(b) 1 B. & A. 176.

The King
 v.
 The Lord
 of the
 Manor
 of North
 Collingham

Rex against The Inhabitants of North Collingham

NORTH COLLINGHAM

After the passing 59 G. 3. c. 50., the pauper held together for a year a house and garden, and paid rent for the same during that period. They were taken of different persons at different times. The rent of the house was six guineas. The pauper underlet one room, communicating with the rest of the house by an inner door, and with the yard by an outer door. The rent of the garden was 3*l.* 15*s.* per annum, and it was occupied by the pauper himself: Held, that although there was a separate taking of the house and of the land, that this was a tenement within the meaning of 59 G. 3. c. 50.; and, secondly, that, although one of the rooms was underlet, still the house continued to be the separate and distinct dwelling-house of the pauper within the meaning of that statute.

TWO justices, by their order, removed *Mary Barks*, the widow of *William Barks*, and her children, from the parish of *North Collingham*, in the county of *Nottingham*, to the parish of *Fulbeck*, in the county of *Lincoln*. Upon appeal, the sessions discharged the order, subject to the opinion of this Court on the following case:

The pauper's husband, being legally settled in *Fulbeck*, came to reside at *North Collingham*, in the year 1812, where he took and hired a house (being a separate and distinct dwelling-house), with a garden, for a year, and from year to year, at the annual rent of 6*l.* 6*s.*, and he continued to hold and occupy such house and garden, and actually paid the aforesaid yearly rent for the same from the year 1812 up to his death, which happened in *December*, 1821; but, during the last four years of his holding the house, he let to a lodger, at thirty shillings a-year, one of the rooms on the ground floor. The room communicated with the yard appurtenant to the house by an outer door, and with the adjoining rooms of the house by an inner door, of which doors the lodger kept the keys. As there was another outer door to the house, no alteration whatever was made in the house or doors during any part of the period for which *William Barks* was tenant thereof. The room was let unfurnished, and the lodger occupied nothing but the room,

and

and *William Barks* was assessed and rated for the entire house to the poor, the highways, and king's taxes, and paid such assessments during the whole of his tenancy. In the year 1819(a), the pauper *bonâ fide* hired a piece of garden ground in the parish of *North Collingham*, for a year, at the rent of *3*l.* 15*s.**, which ground he actually occupied for a year, and paid the said rent, and continued in the occupation thereof up to the time of his death.

1822.
The King
against
The Inhabit-
ants of
NORTH
COLLINGHAM.

Nolan and *Fynes Clinton*, in support of the order of sessions. The settlement turns upon the construction of the 59 G. 3. c. 50., and involves two points. First, Whether the tenement must, under the act, be one entire tenement, taken at one time, and for one entire rent. This is not necessary. The legislature must be presumed to have used the word "tenement" in its legal sense, as it has been understood and explained by judicial decisions. The word "tenement" means the entire holding of the tenant or freeholder, without reference to the time or manner of acquiring it, or the different places in which it is situated. Without advertent to earlier authorities, it may be sufficient to observe, that the words "tenement" and "rent," used in the singular, in the 13 & 14 Car. 2. c. 12., and in the 9 & 10 W. 3. c. 30. s. 11., have been construed as if they were in the plural, *North Nibley v. Wootton-under-Edge* (b), where it was held, that it was not "necessary the tenement

(a) This was admitted, in argument, to have been after the 2d of July, 1819, the day on which the 59 G. 3. c. 50. received the royal assent.

(b) 2 Bott. 115.

1833.
 Rex v. King
 against
 The Trustees
 of the
 New
 Court

should be rented of one person; though it was rented of several, yet in him it was but one." *Rex v. St. Margaret's, Fish-street Hill.* (a) The same words must receive the same construction, when found in the 59 G.3. c. 50, as there is nothing in the act to shew that they were intended to have a different meaning. Indeed, any other construction would lead to much confusion and uncertainty, and would tend to raise questions which the statute intended to prevent. Suppose a house and land descend in coparcenary, or in common, and each person entitled lets his interest; (although on the same day,) yet that will not confer a settlement, if the construction to be contended for on the other side prevail. The second point is, Whether, under the circumstances stated in the case, the pauper can be considered as having held and occupied, and paid the rent for this tenement, within the meaning of the statute. Previously to this act, there was no doubt that a sub-letting to a lodger did not so far disturb the original tenant's occupation and holding as to defeat his settlement, *Rex v. Llanverrus Northop* (b); *Rex v. Hooe*. (c) It is expressly found by the case, that the pauper paid the rent; and whether the rent received from his lodger constituted part of his immediate means for doing so is not found, and is wholly immaterial. Then he clearly held and occupied the entire house. He was rated for the whole: the lodger's room communicated with the rest of his house; and he had a key of the outer door; so that there is no doubt that, in the event of a burglary, it

(a) 1 B. & C. 677. (b) 1 B. 303.
 (c) 4 B. 582.

must have been laid to have been committed in the pauper's house.

1831

The King
against
The Inhabitants
of the Parish
of St. Martin
in the County
of Middlesex

Scarlett and Balguy contra. There cannot be any doubt that before the 59 Geo. 3. c. 50. a settlement might be gained by renting a tenement taken at different times, and part of which was underlet by the tenant. The object of that statute was to restrain the gaining of settlements by renting a tenement, and it ought to be liberally construed with reference to that object. The words are, "that no person shall acquire a settlement by reason of his or her dwelling for forty days in any tenement rented by such person, unless, &c." The word "tenement" is in the singular number; the settlement spoken of is to be gained by reason of the dwelling therein. The word "dwelling" over-rides the whole description. It must therefore signify an entire tenement, consisting of the dwelling-place of the pauper; and if it does, then it must contemplate the taking of the entire tenement at one time. Secondly, there must be an actual occupation for the year of the entire tenement, consisting of a separate and distinct dwelling-house or building. The object of the statute was to simplify this head of settlement, and thereby prevent litigation. The words of the statute require that there shall be a taking for one whole year, the payment of 10*l.* for one whole year, and an occupation for one whole year; and it must be the occupation of a separate and distinct dwelling-house. The occupation by the pauper is not the occupation intended by the legislature, which must be an actual occupation, as distinguished from that occupation in point of law which would have been

1823.

—
 The King
 against
 The Inhabitants
 of
 North
 Chalfont.

been sufficient for the purpose of conferring a settlement previously to this statute. The term "lodger" is improperly applied to the undertenant; for after the underletting by the pauper, the part occupied by the undertenant became his separate and distinct dwelling-house. If a burglary had been committed there, it must have been so charged in an indictment, for he had an outer door, of which he kept the key; and although there was an inner door, which might have been the means of communication, still as the key of that door was put under his control, and as there was no right of passage reserved by the pauper either through this inner door or the other, the part of the dwelling-house occupied by the undertenant was (except by his permission) as effectually severed from the part occupied by the pauper as if a wall had been built between them.

ABBOTT C. J. The question arises on the construction of the statute 59 G. 3. c. 50., which was made for the purpose of restraining the acquisition of settlements by renting tenements. It is a general rule, that acts in pari materia shall receive a similar construction. Before the passing of the act, a party might gain a settlement by taking various tenements at different times. The question is, whether since the passing of the act the tenement must be taken at one rent, and at the same time. The words are, "that no person shall acquire a settlement in any parish or township maintaining its own poor in *England*, by reason of his or her dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building

building within such parish or township, being a separate and distinct dwelling-house or building, or of land within such parish or township, or of both, bona fide hired by such person, at and for the sum of 10*l.* a year, at the least, for the term of one whole year; nor unless such house or building shall be held; and such land occupied; and the rent for the same actually paid, for the term of one whole year at the least by the person hiring the same." Now by this act it is not sufficient that the hiring should be of a tenement of the value of 10*l.* per annum, but the house must be held, and the land occupied, and the rent paid for one whole year. The first question is, whether the pauper held a tenement within the meaning of the statute. Under the former acts a tenement might consist of various parcels taken at various times, and there is nothing in this act to alter the old law in that respect. As to the second question, it is to be observed that a different expression is applied to land and to houses. The house is to be *held* but the land is to be *occupied*: it was probably intended that a party taking lodgers, properly so called, should not be thereby prevented from gaining a settlement. The question is, Did the pauper *hold* the whole dwelling-house? It is said that the lodger held a part distinct from the rest, so that a burglary committed in that part might, in an indictment, be laid to have been in the dwelling-house of the lodger. I think, however, that that proposition is not established by the facts stated. It is said, that putting the key of the inner-door into the hands of the lodger was the same thing as if there was a brick wall between his and the adjoining room. If, indeed, it had been
stated

1828
1829

The King
 against
 The Inhabit-
 ants of
 NORTH
 COLLINGHAM

1823.

The King
against
The Inhabit-
ants of
North
Collingham.

stated that the key was delivered to the lodger for the express purpose of preventing the communication between the different apartments, there would be more weight in the argument. But the key only had been delivered to him for the purpose of enabling him to enter either way, and if that was the object, then it was not any distinct dwelling-house. I rather infer from the facts stated, that that was the object for which the key was delivered; and if so, then the pauper held the whole house, and it is to be considered as one entire tenement; and in that case, a burglary committed in the part occupied by the lodger must have been held to have been in the dwelling-house of the pauper. For these reasons I am of opinion, that the pauper gained a settlement in the parish of *North Collingham*, and that the order of sessions must be affirmed.

BAYLEY J. I agree entirely with my Lord Chief Justice. The second point is a question of fact rather than of law. The sessions might have found it a separate holding; but I see nothing in the facts stated, from which a separation of the part occupied by the lodger from the rest of the house must be necessarily inferred.

HOLROYD J. The word tenement in this statute must receive the same construction as it has in former acts, made in *pari materia*. The statute was only intended to alter the law in the particulars distinctly pointed out; and nothing is said to make it necessary that the whole of the tenement should be taken at one time. I am, also, of opinion, upon the facts stated, that

that the whole dwelling-house is to be considered as the dwelling-house of the prisoner, by sleeping therein.

It is not to be considered as a dwelling-house, but as a room.

But, I am probably was the intention of the legislature, that a settlement should not be gained in such a manner as the present. But we are bound to decide according to the words of the statute, and unto the first point, I entirely agree with the rest of the Court: as to the second, I have no doubt that in an indictment for burglary, the room occupied by the lodger might be described as the prisoner's dwelling-house. Notwithstanding the underletting, in point of law he still continued the tenant of the whole house.

Order of sessions confirmed.

The KING against SAMUEL BOWER the younger.

Wednesday,
April 30th.

MANDAMUS commanding the defendant to take the oath for the due execution of the office of a common councilman of the borough and town of Lancaster, and to take upon himself, and execute that office.

Return — That by a certain bye-law made at a certain council duly holden within the said borough, it was enacted, that common councilmen should be elected in a particular mode; and if any person, so chosen, should, after due notice or summons, refuse to appear, and take upon him the office of common councilman, he

Mandamus commanding defendant to take upon himself the office of common councilman in the borough of Lancaster.

Return — That by a bye-law, persons refusing to fill that office are subject to a certain fine, and that defendant has paid the fine.

Held, that the

return was insufficient, as it did not state that the fine was to be taken of service.

Vol. I.

Q q

should,

1825.

The King
against
BOWER.

should, for such refusal, forfeit the sum of 6*l.* 15*s.* 4*d.* and that, although he (*Samuel Bower*) was elected into the place and office of common councilman of the said borough and town as within mentioned, yet after such election, to wit, on, &c., notice was given to the said *Samuel Bower* of his having been so elected; and he, the said *Samuel Bower*, upon receipt of the notice, refused to take upon himself the said office; and afterwards, to wit, on, &c., he (*Samuel Bower*) was summoned to attend at the town-hall of the said borough, on, &c., in order to take the oaths prescribed for common councilmen, or to assign some good and sufficient reason why he declined accepting the said office; upon which occasion he again refused to take upon himself the office of common councilman, and to appear and take the oaths aforesaid, by reason whereof, and by force of the said bye-law, he forfeited the sum of 6*l.* 15*s.* 4*d.*, which fine he afterwards duly paid to *J. B. Nattage* and *J. Bradshaw*, then being the chamberlains of the said borough, who received the same of him, for the use of the mayor, bailiffs, commonalty of the borough, as a fine and forfeiture for his, the said *Samuel Bower's* refusal to take upon himself the said office as aforesaid.

Wightman took exception to the return as insufficient, because it did not allege that the fine paid by the defendant was in lieu of service. The Court then called upon

The *Solicitor-General* (with whom was *Armstrong*) to support the return. This bye-law created the offence,

it

it must therefore be considered, that the fine imposed by that bye-law discharged the party paying it from the obligation to serve the office.

1823.

The King
against
BOWEN.

Per Curiam. It is an offence at common law to refuse to serve an office when duly elected. The bye-law in this case does not say, that the party paying the fine shall be exempt from serving the office, or that the fine is to be in lieu of service. As that is not declared in the bye-law, we cannot say that the payment shall have any such operation.

Peremptory mandamus awarded.

1823.

Friday,
May 2d.

A. B. being sole owner of a ship, by indenture of the 24th June, 1819, assigned three fourth shares of it to a creditor, as security for a debt. The deed contained clauses by which the creditor was to reconvey the three fourth shares upon payment of his debt, and a power of sale to the creditor, in case the debt was not paid within a given time: *A. B.* was to be permitted to freight the ship, and to load cargoes from time to time, &c., and was to insure the ship for the amount of the debt in the

name of the creditor, or otherwise to assign the policies to him. At the time of the execution of the deed, the ship was absent from her port of registry on a voyage to *North America*, but all the forms prescribed by the ship-registry acts, as to the transfer, were duly complied with. The ship returned to her port of registry in July, 1819, and was constantly employed from that time till February, 1822, by *A. B.* in carrying cargoes for his own use and on his sole account, and he continued during all that time in the actual possession of the ship, and so manage and navigate her without the interference or control of the creditor. *A. B.* having become bankrupt, it was held, that as he had once been the real owner of the whole ship, and had never done any thing to make it notorious to the world that he had ceased to be the owner of the three-fourth shares, he continued to be the apparent owner of those shares with the consent of the true owner, down to the time of the act of bankruptcy, and, therefore, that those shares passed to his assignees, as property in his order and disposition within the meaning of the 22^d Jan. 1. 1793.

KIRKLEY and BLACKBURN, Assignees of THOMPSON, a Bankrupt, against HODGSON.

TROVER for three-fourths of a ship. Plea, general issue. The cause was tried at the last Summer assizes for the county of *Northumberland*, when a verdict was found for the plaintiffs, for 1569*l.* 2*s.* 4*d.*, subject to the opinion of this Court on the following case: *J. Thompson, of South Shields, in the county of Durham, the bankrupt, before and at the time of executing the indenture hereinafter mentioned, was the sole owner of the ship called The British Queen, registered in his name, in the port of Newcastle. By an indenture of the 24th June, 1819, made between the said J. Thompson of the one part, and J. Hodgson (the defendant) of the other part, reciting, that Thompson was indebted to Hodgson in the sum of 2400*l.*, and that he had proposed to assign unto Hodgson, his executors, &c. three fourth parts or shares of the ship in question, for securing the repayment of that sum, and interest, and reciting also the certificate of the registry of the ship.*

It was held, that the ship, at the time of the execution of the deed, was absent from her port of registry on a voyage to *North America*, but all the forms prescribed by the ship-registry acts, as to the transfer, were duly complied with. The ship returned to her port of registry in July, 1819, and was constantly employed from that time till February, 1822, by *A. B.* in carrying cargoes for his own use and on his sole account, and he continued during all that time in the actual possession of the ship, and so manage and navigate her without the interference or control of the creditor. *A. B.* having become bankrupt, it was held, that as he had once been the real owner of the whole ship, and had never done any thing to make it notorious to the world that he had ceased to be the owner of the three-fourth shares, he continued to be the apparent owner of those shares with the consent of the true owner, down to the time of the act of bankruptcy, and, therefore, that those shares passed to his assignees, as property in his order and disposition within the meaning of the 22^d Jan. 1. 1793.

1323.

KIRKLEY
against
HODGSON.

It was witnessed, that, in order the better to secure the payment of that sum, with interest, and also in consideration of 10s. in hand, paid to *Thompson* by *Hodgson*, *Thompson* bargained, sold, and assigned to *Hodgson*, his executors, &c., the three fourth shares of the ship described in the certificate of registry, then on a voyage to *North America*, to have and to hold the said three fourth shares to *Hodgson*, upon the trusts therein mentioned. The indenture then contained a proviso, that if *Thompson* should pay to *Hodgson*, &c., on the 24th *June*, 1822, the said sum of 2400*l.*, with interest, in the mean time, payable half-yearly, on certain days therein mentioned, then in such case *Hodgson* should reconvey and re-assign to *Thompson* the three fourth shares of the ship and should sign the necessary indorsement of such transfer on the certificate of registry of the ship, when required: there then followed covenants for payment of the said sum of 2400*l.* for title, for further assurance, and assignment of policies. The deed also contained a clause, that in case default should be made in payment of the sum of 2400*l.*, upon the 24th *June*, 1822, or in payment of the interest, it should be lawful to *Hodgson*, his executors, &c., immediately to sell the three fourth shares of the ship; and further, that in the mean time, and until default should be made in payment of the said sum of money or the interest, at the time thereinbefore mentioned, *Hodgson*, his executors, &c. should permit the ship to be freighted, and to take on board such cargoes as *Thompson*, his executors, &c. should direct, so as *Thompson*, his executors, &c. should from time to time keep the said three fourth parts or shares insured from loss or capture, in the sum of 2400*l.* at the least, and should cause every such insurance to be effected in the

1823.

KIRKLEY
against
Hodgson.

name of *Hodgson*, or otherwise should assign the policies of insurance, in case they should be effected in the name of him (*Thompson*), his executors, &c. to him (*Hodgson*), his executors, &c. At the time of the execution of the indenture, the ship was absent from her port of registry, in the progress of a voyage to *North America*, but the forms prescribed by the ship registry acts, as to the transfer, were duly complied with. The defendant, at the time of making the indenture, and from thence hitherto, has resided at *Shadwell*, in the county of *Middlesex*. The ship returned to the port of *Newcastle* in *July*, 1819, since which time, up to the 7th of *February*, 1822, she was constantly employed by *Thompson* in the loading and carrying of coals from the port of *Newcastle* to the port of *London*, for his use and on his sole account. From the time of making the indenture till the 7th of *February*, 1822, *Thompson* continued in the actual possession of the ship, and to manage and navigate her without the interference or control of the defendant, *Hodgson*. In *January*, 1822, and in the month of *December* in the preceding year, *Thompson* committed several acts of bankruptcy, upon which a commission of bankrupt was issued against him, on the 7th of *February*, 1822, under which he was duly declared a bankrupt, and the plaintiffs were chosen his assignees, and had an assignment duly made to them from the commissioners. On the 7th day of the same month of *February*, the defendant (there being at that time one year and a half interest only in arrear) took possession of three fourth parts of the ship, and of the certificate of the registry thereof, and before the commencement of this action refused to deliver the same upon the demand of the plaintiffs. *Thompson* never in any manner parted with or disposed of the remaining one fourth part of the said ship.

Campbell, for the plaintiffs. The bankrupt, at the time of his act of bankruptcy, had in his possession, order, and disposition, three fourth shares of this ship, with the consent of the true owner, within the meaning of the 21. *Jac.* 1. c. 19. Here the defendant, as mortgagee, was the true owner of three fourths, and he permitted the bankrupt to continue in possession, and to appear to the world as the real owner, up to the time of his act of bankruptcy. It is a case, therefore, clearly within the mischief contemplated by the statute. If the whole of the ship had been mortgaged to the defendant the cases of *Robinson v. Macdonell* (a), *Hay v. Fairbairn* (b), and *Mankhouse v. Hay* (c), shew that the property would have passed to the assignees. The fact of aliquot shares only having been conveyed, and the bankrupt in his own right still holding one-fourth, cannot make any difference. In *Ryall v. Rolle* (d) the bankrupt had assigned one-seventh share of his moiety of certain stock in trade to *Rennell*, and other two-sevenths to other persons, so that he was tenant in common with the mortgagees, yet he was held to have the order and disposition of those shares, within the meaning of the statute of *James*. *Flyn v. Matthews* (e) is not an authority for the defendant, although, at first sight, it may appear to be so. The bankrupt had sold two-thirds of 500 barrels of tar, lying at the wharf at *Liverpool*, to *Flyn* and another person. The other third he agreed to consign to the vendees of the two-thirds, and he was to ship the whole as soon as an opportunity offered. *Matthews*

1823.

 Kinkaid
 against
 Hanson

(a) 5 M. & S. 228.

(b) 2 B. & A. 193.

(c) 2 Brod. & B. 114.

(d) 1 Ark. 165. 1 Ves. sen. 548. & C. by the name of *Ryall v. Rowles*.

(e) 1 Ark. 185.

1863,

Kipley
against
Haggren,

afterwards caused the tar to be put into his warehouse and became bankrupt while the tar was in his possession, and it was held, that the property in it did not pass to his assignees. There, however, the two-thirds were left in the hands of the bankrupt for a special purpose, viz. as agent to the owner for shipping it. If the whole of the tar had been entrusted to him for that purpose, it would not have passed to his assignees; for property in possession of a factor for sale is not within the statute. The decision there proceeded expressly upon the ground that the property had been entrusted to the bankrupt for a special purpose. The opinion of the Lord Chancellor, that the bankrupt and the vendees were tenants in common, and that the possession of one was the possession of all was extrajudicial. It is true, that, in the case of *Coldwell v. Gregory* (a), the Court of Exchequer, held, that the share of a secret partner in the joint stock in trade in the possession of the apparent partner and the sole ostensible trader, was not within the statute, on the ground that the bankrupt had such an interest and qualified property in the secret partner's share as to destroy the essential requisites of a reputed ownership, as distinguished from a true ownership. In *Ex parte Dyster* (b), however, a similar question arose, and the Lord Chancellor expressed great doubt upon the propriety of the decision in *Coldwell v. Gregory*, and said that he would not decide the question without legal assistance. But supposing *Coldwell v. Gregory* to be good law, there is a great difference between the case of a dormant partner and that of a mortgagee of part of a ship allowing the mortgagor to remain in possession of the

(a) 1 Price, 119.

(b) 2 Rose, B. C. 256.

whole,

whole, as sole owner; for the credit of the ostensible partner would be increased were the dormant partnership known, as the dormant partner is liable for the whole of the partnership debts; whereas the credit of the mortgagor would be lessened were the mortgage known, for the mortgagee out of possession is not liable for the ship's debts.

1823:

——
 Knight
 against
 Harcourt

Parke, contra. The words of the 21 Jac.1. c. 19. s. 11. are, "That if at any time hereafter any person or persons shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners, that in every such case the said commissioners shall have power to sell and dispose of the same, to and for the benefit of the creditors, which shall seek relief by the commission, as fully as any other part of the estate of the bankrupt." In order to bring a case within the statute, first, the true owner must be a person distinct from the apparent owner, and there can be no apparent ownership except of chattels, of which the bankrupt is not a real owner; and, secondly, a false credit must be gained. In *Joy v. Campbell (a)*, Lord *Redesdale* stated the statute to apply to cases, "Where the possession, order, and disposition, is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits unconscientiously, as the act supposes, to have such or-

(a) 1 *Schole & Lefroy*, 328.

1838.

KEENE
against
HARRISON

der and disposition." A similar doctrine is laid down by Lord Hardwicke, in *Ryall v. Rawles*. (a). In the present instance, the bankrupt was a part-owner, and, in that character, legally entitled to the possession of the ship, and to do all the acts (as far as they appeared to the world) found by the special case. One part-owner must put on board cargoes, and receive them. Both cannot always be personally present, or personally in possession, and what the part-owner, receiving the profits, afterwards does with them in his counting-house, is a matter of which third persons do not take notice. No false credit was gained; for a third person had no right to draw any other inference from the facts found, as far as they would meet his eye, than that the bankrupt had some share of the ship, not the entirety. The only way of ascertaining the quantum of interest was by the register, and that discloses the fact, that the bankrupt was a part-owner only. The consequences of deciding that the share of the defendant passes to the assignees, would be, that the share-holders of *East India* and other ships would lose their property if a part-owner, who was also ship's husband, should become bankrupt. Then the authorities are all in favour of the defendant. *Gillespy v. Crichton* (b), *Ex parte Flynn*; in which latter case the bankrupt was tenant in common, and the interest of his co-tenant in common was held not to pass to his assignees. That was the true ground of the decision, as appears from Lord Ch. J. Mansfield's decision in *Macklin v. Mangles*. (c) The case of *Coldwell v. Gregory*. (d) is a stronger case than the present; because that was a case of partnership, and in all such cases a don-

(a) 1 Ves. 372.

(c) 1 Taunt. 318.

(b) *Ambler*, 652.

(d) 1 Price, 119.

ment partner, by permitting a dealing in the name of another, may be said to give a false credit; for he might have had his own name inserted in the firm. A part-owner of a ship has no means of giving the world notice of his interest, except by the register. In *Ex parte Dyster*, the Lord Chancellor does not intimate his doubts so much of the correctness of the decision in *Coldwell v. Gregory* as of the report. The authorities cited on the other side apply to cases where the bankrupt had no title to the possession of the thing mortgaged or sold. In *Ryall v. Rowles*, the bankrupt had parted with all his interest by the first mortgage, and his possession was, therefore, altogether irreconcilable with his title.

1828.

Ex parte
against
Hancock.

Campbell, in reply. It is not contended, that where one tenant in common of a chattel is in possession of the whole, and becomes a bankrupt, that the whole necessarily passes to his assignees; but that the statute does apply where one tenant in common is allowed by the other to appear to the world as sole owner of the chattel, and to use it for his own exclusive advantage, and to have an order and disposition of it, which cannot be accounted for by his being merely a tenant in common. A fortiori must the statute apply where the whole did originally belong to the bankrupt, and nothing is done to intimate to the world any change in the property. *Lingard v. Messiter* (a) is a strong authority in favour of the plaintiff. There is no analogy between this case and that of the husband of an *East India* ship, who is controlled by the other part-owners in the management of the ship, and regularly accounts to them for her earnings.

(a) Ante, 308.

1823.

Manly
v. Manly

with *Bayard J.* (a) If the decision in this case would be all trench upon the case of *Caldwell v. Grigory* (b), the Court, constituted as it now is, would certainly take time to consider before they pronounced any judgment. But I think it plainly distinguishable from that case, and clearly within the mischief and the spirit of the 28 *Jas. I. c. 19*. The object of that statute is, that where the true owner suffers another person to have the possession of goods and chattels, so that the latter has the apparent ownership, with the consent of the true proprietor, down to the time of the apparent owner's becoming a bankrupt, the assignees under the commission shall be entitled to take such goods as against the true owner, and shall be at liberty, as against him, to treat them as the property of the bankrupt. The effect of leaving the goods and chattels in the possession of a man who is not the true owner, is to enable that person to obtain credit. He obtains that credit through the medium and with the concurrence of the true owner of the goods; and then, upon principles of common justice, he who has enabled another to practise a deception, ought to be the sufferer. In this case, *Thompson* was the original owner of the whole of this ship. He was the only person who registered it; and he was originally not the apparent but the true owner of the whole. That was the situation in which the world had a right to consider him. He afterwards, by what at present I call a secret act between himself and the defendant, mortgages to the defendant, not the whole, but three-fourths of that ship. The latter does no act whatever to make it generally known that there has been any

(a) *Abbott C. J.* and *Best J.* were absent from indisposition.

(b) *1 Price, 119.*

alteration in the property. It has been decided, in the cases of *Monkhouse v. Hay* (a), *Hay v. Fairbairn* (b), and *Robinson v. McDonnell* (c), that the alteration of the register is not to be considered as notice to the world. The register acts were made entirely *alio intuitu*: their object was not to give notice to the world, but to give notice to government. The fact of altering the register is to be considered as much a secret act as the execution of a secret conveyance; so that, though the true ownership would appear on the face of the register, that does not vary the case. It has been conceded in argument, that if there had been a conveyance of the whole ship, it would have been a case within the statute; but it is said that it is not within the statute, because there is only a conveyance of part, and that the party remaining in possession, being tenant in common with the assignee, is entitled to the possession in his own right. If this were the legal effect of a part-conveyance, how much of the mischief contemplated by the statute would ensue? A man, originally the owner of all the stock in trade in a shop or warehouse, though he could not effectually, so as to avoid the operation of 21 Jac. 1. c. 19., assign the whole to a creditor as a security, might assign over nine-tenths or ninety-nine hundredth parts, and still remain in possession of the whole. And though he would thereby obtain the delusive credit the statute meant to prevent, viz. a delusive credit to the extent of the whole, it would be a ready answer to his assignees, if he became bankrupt, and they claimed the whole, that indeed he was actual owner of a tenth or hundredth part only, and therefore tenant in common with the party to whom he had made the

1833.

Ministry
against
Hawes.

(a) 2 Brod. & B. 114. (b) 2 B. & A. 193. (c) 5 M. & S. 228.

1829.

Kirkner
against
Hobson.

secret assignment; and that as one tenant in common of an entire and indivisible chattel was as much entitled to the possession of it as each of the other tenants in common, and as his possession to the extent of his tenth or hundredth part was a rightful possession, the case could not be within the statute as to the other parts or shares. In my judgment it makes no difference whether a trader assigns his whole interest, or a part only, if the assignee suffer him to have the apparent ownership, of what is so assigned, down to the time when he becomes bankrupt. My opinion is, that the assignees are entitled to it under the 21 Jac. 1. c. 19. The party entitled to the possession as assignee of part may undoubtedly forbear to take actual possession of that part; but then he must take care that it is made notorious to the world that there has been a change of ownership as to that part. By so doing, the mischief contemplated by the statute is prevented. But if he whose real ownership is reduced from the whole to a fourth, is allowed to have the possession of the other three-fourths, as if he continued owner of the whole, he thereby appears to the world as owner of the whole, and he is enabled to obtain credit to the extent of the value of the whole, when he ought to have credit to the extent of one-fourth only. The cases referred to in argument seem to me distinguishable from the present. To bring a case within the statute, the bankrupt must have the continued possession of the property, with the consent of the true owner, down to the time when he becomes bankrupt; and the bankrupt and the owner must be different persons. In *Joy v. Campbell* (a), the bankrupt, long before his bankruptcy, became the owner, though

(a) 1 Schoales & Lefroy, 328.

1823.

KIRKLEY
against
HOBSON.

en autre droit. He was not only apparent owner, but he was real owner also. He at first held the property as trustee for his brother. But his brother died, having appointed him executor. Upon that event, he united in himself the two characters of trustee and *cestui que trust*; and from that time he would hold, not as he previously held as trustee, but in his preferable title as executor. There was no longer one person apparent owner, and another person real owner; there was no person who, in the character of real owner, could have disjoined the possession from the bankrupt; he was the only person entitled to the possession. This was clearly the ground of Lord *Redeale's* decision. He states distinctly, that the statute only applies where the possession, order, and disposition is in a person who is not the owner, and who ought not to have them; but whom the owner permits unconscientiously, as the act supposes, to have the order and disposition; and he asks this question: Who was the true owner of this property after *William's* death? (*William* was the *cestui que trust*; *Thomas*, the trustee and bankrupt.) The true owner, says he, was *Thomas*, subject to the payment of *William's* debts and legacies. His possession, therefore, was according to his right. *Ex parte Flyn* (a) was treated by Lord *Hardwicke* as a case of temporary custody only. The tar was originally lying on the quay at *Liverpool*, and was probably lying there for the purpose of being there exposed for sale. Before it got into the warehouse or cellar of *Matthews* (for the place where it was deposited is called a warehouse or cellar), and before he could obtain any credit from having it in his warehouse

(a) 1 *Alt.* 185.

1895
2161

WILKINSON
HARRIS

or cellar, it had become the joint property of him and the vendees; and from the report of the case in 4th Inst I doubt whether he had it in his power to do so. In such circumstances, as would give him the right of ownership, or obtain him any credit. If, however, the common place for the sale of such articles was probably the case, the removal of them from the quays to the warehouse or cellar of the bankrupt would rather raise the inference that they were sold and had ceased to be his property, and were removed for a temporary purpose only, for the benefit and on account of the purchaser. Had they been removed to a place where such goods were commonly exposed for sale it would have been a different case, but they were removed merely for the purpose of being kept till the buyers of the two thirds could meet with an opportunity for shipping them; and the case was decided on the ground that the bankrupt, whilst the goods were in his warehouse or cellar, had a temporary custody only, not the order of disposition; and that, during the whole time they were there, the bankrupt and his vendees were partners in common. No stress was laid on the fact that the tea when landed on the quays, was the sole property of the bankrupt, and that nothing had occurred from whence a change of ownership might be inferred; but the case was put upon the possession in the warehouse or cellar, and upon that only. But suppose that Matthews in that case had been the sole owner of the tea when it came into his warehouse, that that warehouse had been the common place for his unsold goods, that whilst it was there he had secretly sold two thirds, with a stipulation that it should remain in his possession till the goods had an opportunity of sending it abroad, that nothing

2161, 2162 (b) 1 (c) 1 (d) 1 (e) 1 (f) 1 (g) 1 (h) 1 (i) 1 (j) 1 (k) 1 (l) 1 (m) 1 (n) 1 (o) 1 (p) 1 (q) 1 (r) 1 (s) 1 (t) 1 (u) 1 (v) 1 (w) 1 (x) 1 (y) 1 (z) 1 (aa) 1 (ab) 1 (ac) 1 (ad) 1 (ae) 1 (af) 1 (ag) 1 (ah) 1 (ai) 1 (aj) 1 (ak) 1 (al) 1 (am) 1 (an) 1 (ao) 1 (ap) 1 (aq) 1 (ar) 1 (as) 1 (at) 1 (au) 1 (av) 1 (aw) 1 (ax) 1 (ay) 1 (az) 1 (ba) 1 (bb) 1 (bc) 1 (bd) 1 (be) 1 (bf) 1 (bg) 1 (bh) 1 (bi) 1 (bj) 1 (bk) 1 (bl) 1 (bm) 1 (bn) 1 (bo) 1 (bp) 1 (bq) 1 (br) 1 (bs) 1 (bt) 1 (bu) 1 (bv) 1 (bw) 1 (bx) 1 (by) 1 (bz) 1 (ca) 1 (cb) 1 (cc) 1 (cd) 1 (ce) 1 (cf) 1 (cg) 1 (ch) 1 (ci) 1 (cj) 1 (ck) 1 (cl) 1 (cm) 1 (cn) 1 (co) 1 (cp) 1 (cq) 1 (cr) 1 (cs) 1 (ct) 1 (cu) 1 (cv) 1 (cw) 1 (cx) 1 (cy) 1 (cz) 1 (da) 1 (db) 1 (dc) 1 (dd) 1 (de) 1 (df) 1 (dg) 1 (dh) 1 (di) 1 (dj) 1 (dk) 1 (dl) 1 (dm) 1 (dn) 1 (do) 1 (dp) 1 (dq) 1 (dr) 1 (ds) 1 (dt) 1 (du) 1 (dv) 1 (dw) 1 (dx) 1 (dy) 1 (dz) 1 (ea) 1 (eb) 1 (ec) 1 (ed) 1 (ee) 1 (ef) 1 (eg) 1 (eh) 1 (ei) 1 (ej) 1 (ek) 1 (el) 1 (em) 1 (en) 1 (eo) 1 (ep) 1 (eq) 1 (er) 1 (es) 1 (et) 1 (eu) 1 (ev) 1 (ew) 1 (ex) 1 (ey) 1 (ez) 1 (fa) 1 (fb) 1 (fc) 1 (fd) 1 (fe) 1 (ff) 1 (fg) 1 (fh) 1 (fi) 1 (fj) 1 (fk) 1 (fl) 1 (fm) 1 (fn) 1 (fo) 1 (fp) 1 (fq) 1 (fr) 1 (fs) 1 (ft) 1 (fu) 1 (fv) 1 (fw) 1 (fx) 1 (fy) 1 (fz) 1 (ga) 1 (gb) 1 (gc) 1 (gd) 1 (ge) 1 (gf) 1 (gg) 1 (gh) 1 (gi) 1 (gj) 1 (gk) 1 (gl) 1 (gm) 1 (gn) 1 (go) 1 (gp) 1 (gq) 1 (gr) 1 (gs) 1 (gt) 1 (gu) 1 (gv) 1 (gw) 1 (gx) 1 (gy) 1 (gz) 1 (ha) 1 (hb) 1 (hc) 1 (hd) 1 (he) 1 (hf) 1 (hg) 1 (hh) 1 (hi) 1 (hj) 1 (hk) 1 (hl) 1 (hm) 1 (hn) 1 (ho) 1 (hp) 1 (hq) 1 (hr) 1 (hs) 1 (ht) 1 (hu) 1 (hv) 1 (hw) 1 (hx) 1 (hy) 1 (hz) 1 (ia) 1 (ib) 1 (ic) 1 (id) 1 (ie) 1 (if) 1 (ig) 1 (ih) 1 (ii) 1 (ij) 1 (ik) 1 (il) 1 (im) 1 (in) 1 (io) 1 (ip) 1 (iq) 1 (ir) 1 (is) 1 (it) 1 (iu) 1 (iv) 1 (iw) 1 (ix) 1 (iy) 1 (iz) 1 (ja) 1 (jb) 1 (jc) 1 (jd) 1 (je) 1 (jf) 1 (jg) 1 (jh) 1 (ji) 1 (jj) 1 (jk) 1 (jl) 1 (jm) 1 (jn) 1 (jo) 1 (jp) 1 (jq) 1 (jr) 1 (js) 1 (jt) 1 (ju) 1 (jv) 1 (jw) 1 (jx) 1 (jy) 1 (jz) 1 (ka) 1 (kb) 1 (kc) 1 (kd) 1 (ke) 1 (kf) 1 (kg) 1 (kh) 1 (ki) 1 (kj) 1 (kk) 1 (kl) 1 (km) 1 (kn) 1 (ko) 1 (kp) 1 (kq) 1 (kr) 1 (ks) 1 (kt) 1 (ku) 1 (kv) 1 (kw) 1 (kx) 1 (ky) 1 (kz) 1 (la) 1 (lb) 1 (lc) 1 (ld) 1 (le) 1 (lf) 1 (lg) 1 (lh) 1 (li) 1 (lj) 1 (lk) 1 (ll) 1 (lm) 1 (ln) 1 (lo) 1 (lp) 1 (lq) 1 (lr) 1 (ls) 1 (lt) 1 (lu) 1 (lv) 1 (lw) 1 (lx) 1 (ly) 1 (lz) 1 (ma) 1 (mb) 1 (mc) 1 (md) 1 (me) 1 (mf) 1 (mg) 1 (mh) 1 (mi) 1 (mj) 1 (mk) 1 (ml) 1 (mm) 1 (mn) 1 (mo) 1 (mp) 1 (mq) 1 (mr) 1 (ms) 1 (mt) 1 (mu) 1 (mv) 1 (mw) 1 (mx) 1 (my) 1 (mz) 1 (na) 1 (nb) 1 (nc) 1 (nd) 1 (ne) 1 (nf) 1 (ng) 1 (nh) 1 (ni) 1 (nj) 1 (nk) 1 (nl) 1 (nm) 1 (nn) 1 (no) 1 (np) 1 (nq) 1 (nr) 1 (ns) 1 (nt) 1 (nu) 1 (nv) 1 (nw) 1 (nx) 1 (ny) 1 (nz) 1 (oa) 1 (ob) 1 (oc) 1 (od) 1 (oe) 1 (of) 1 (og) 1 (oh) 1 (oi) 1 (oj) 1 (ok) 1 (ol) 1 (om) 1 (on) 1 (oo) 1 (op) 1 (oq) 1 (or) 1 (os) 1 (ot) 1 (ou) 1 (ov) 1 (ow) 1 (ox) 1 (oy) 1 (oz) 1 (pa) 1 (pb) 1 (pc) 1 (pd) 1 (pe) 1 (pf) 1 (pg) 1 (ph) 1 (pi) 1 (pj) 1 (pk) 1 (pl) 1 (pm) 1 (pn) 1 (po) 1 (pp) 1 (pq) 1 (pr) 1 (ps) 1 (pt) 1 (pu) 1 (pv) 1 (pw) 1 (px) 1 (py) 1 (pz) 1 (qa) 1 (qb) 1 (qc) 1 (qd) 1 (qe) 1 (qf) 1 (qg) 1 (qh) 1 (qi) 1 (qj) 1 (qk) 1 (ql) 1 (qm) 1 (qn) 1 (qo) 1 (qp) 1 (qq) 1 (qr) 1 (qs) 1 (qt) 1 (qu) 1 (qv) 1 (qw) 1 (qx) 1 (qy) 1 (qz) 1 (ra) 1 (rb) 1 (rc) 1 (rd) 1 (re) 1 (rf) 1 (rg) 1 (rh) 1 (ri) 1 (rj) 1 (rk) 1 (rl) 1 (rm) 1 (rn) 1 (ro) 1 (rp) 1 (rq) 1 (rr) 1 (rs) 1 (rt) 1 (ru) 1 (rv) 1 (rw) 1 (rx) 1 (ry) 1 (rz) 1 (sa) 1 (sb) 1 (sc) 1 (sd) 1 (se) 1 (sf) 1 (sg) 1 (sh) 1 (si) 1 (sj) 1 (sk) 1 (sl) 1 (sm) 1 (sn) 1 (so) 1 (sp) 1 (sq) 1 (sr) 1 (ss) 1 (st) 1 (su) 1 (sv) 1 (sw) 1 (sx) 1 (sy) 1 (sz) 1 (ta) 1 (tb) 1 (tc) 1 (td) 1 (te) 1 (tf) 1 (tg) 1 (th) 1 (ti) 1 (tj) 1 (tk) 1 (tl) 1 (tm) 1 (tn) 1 (to) 1 (tp) 1 (tq) 1 (tr) 1 (ts) 1 (tt) 1 (tu) 1 (tv) 1 (tw) 1 (tx) 1 (ty) 1 (tz) 1 (ua) 1 (ub) 1 (uc) 1 (ud) 1 (ue) 1 (uf) 1 (ug) 1 (uh) 1 (ui) 1 (uj) 1 (uk) 1 (ul) 1 (um) 1 (un) 1 (uo) 1 (up) 1 (uq) 1 (ur) 1 (us) 1 (ut) 1 (uu) 1 (uv) 1 (uw) 1 (ux) 1 (uy) 1 (uz) 1 (va) 1 (vb) 1 (vc) 1 (vd) 1 (ve) 1 (vf) 1 (vg) 1 (vh) 1 (vi) 1 (vj) 1 (vk) 1 (vl) 1 (vm) 1 (vn) 1 (vo) 1 (vp) 1 (vq) 1 (vr) 1 (vs) 1 (vt) 1 (vu) 1 (vv) 1 (vw) 1 (vx) 1 (vy) 1 (vz) 1 (wa) 1 (wb) 1 (wc) 1 (wd) 1 (we) 1 (wf) 1 (wg) 1 (wh) 1 (wi) 1 (wj) 1 (wk) 1 (wl) 1 (wm) 1 (wn) 1 (wo) 1 (wp) 1 (wq) 1 (wr) 1 (ws) 1 (wt) 1 (wu) 1 (wv) 1 (ww) 1 (wx) 1 (wy) 1 (wz) 1 (xa) 1 (xb) 1 (xc) 1 (xd) 1 (xe) 1 (xf) 1 (xg) 1 (xh) 1 (xi) 1 (xj) 1 (xk) 1 (xl) 1 (xm) 1 (xn) 1 (xo) 1 (xp) 1 (xq) 1 (xr) 1 (xs) 1 (xt) 1 (xu) 1 (xv) 1 (xw) 1 (xx) 1 (xy) 1 (xz) 1 (ya) 1 (yb) 1 (yc) 1 (yd) 1 (ye) 1 (yf) 1 (yg) 1 (yh) 1 (yi) 1 (yj) 1 (yk) 1 (yl) 1 (ym) 1 (yn) 1 (yo) 1 (yp) 1 (yq) 1 (yr) 1 (ys) 1 (yt) 1 (yu) 1 (yv) 1 (yw) 1 (yx) 1 (yz) 1 (za) 1 (zb) 1 (zc) 1 (zd) 1 (ze) 1 (zf) 1 (zg) 1 (zh) 1 (zi) 1 (zj) 1 (zk) 1 (zl) 1 (zm) 1 (zn) 1 (zo) 1 (zp) 1 (zq) 1 (zr) 1 (zs) 1 (zt) 1 (zu) 1 (zv) 1 (zw) 1 (zx) 1 (zy) 1 (zz)

had been done to distinguish it from his other goods he had upon sale, and that he had become bankrupt whilst it remained in his possession, I should be disposed to think he would be considered as having it in his order and disposition, and that it would have belonged to his assignees. In *Beckett v. Mangles* (a) *Mansfield* C. J. seems to me to have taken a similar view of the case of *Byn v. Matthews*; for he says, "It was necessarily held, that the tar was not in the possession of the bankrupt; otherwise, in every case of tenancy in common with a bankrupt, the act of bankruptcy would vest the entire property of the chattel in his assignees." In my view of the subject, it is not in every such case that the entire property will so vest. I think it will vest in those cases only in which the tenant in common allows the bankrupt to have the apparent ownership of the whole. The case of *Coldwell v. Gregory* (b), in my judgment, also falls within the same principle. The bricks appear to have been made during the period of time when *Gregory* and *Hatfield* were in partnership; and, therefore, they were originally the joint property of the bankrupt and his partner. That constitutes a plain distinction between that case and the present; because, here, the property was not originally the joint property of *Thompson* and the defendant, but the separate property of *Thompson* only. *Gillespy v. Courts* (c) was not a case of bankruptcy, and no question was made, or could be made, upon the statute of *James*. These answers dispose of the authorities relied upon by the defendant; and none of them are contravened by my decision, which is founded entirely upon this ground, that *Thompson* was originally

(a) 1 *Trant*, 510.(b) 1 *Price*, 119.(c) *Amber*, 652.

KRAKENT

KraKent
apolog
KraKent

property. In the case of the property, which is upon any of the cases which have been referred to in arguments, and which are cited as authorities from the present upon the grounds already stated by my Brother *Bayley*.

Bayley, in the case of the property, which is upon any of the cases which have been referred to in arguments, and which are cited as authorities from the present upon the grounds already stated by my Brother *Bayley*.

The Case against Jeffreys:

TWO justices, by an order, dated the 5th day of November, 1821, ordered *Jeffreys* to pay to the lessor of the tithes of the parish of *Glemsford*, in the county of *Suffolk*, the sum of 61*l.* for his tithe of milk and calves, arising in the parish of *Glemsford*, and due to the lessor, together with his costs and charges. *Jeffreys* was only summoned to answer the complaint of the lessor, and appeared before the justices, but offered no evidence of a modus. The sessions, on appeal, confirmed the order, subject to the opinion of the Court upon the following case:

The respondent having proved the notice, summons, and order, and his title as lessee, and that the value of the tithe was of the amount demanded; the appellant claimed to be exempted from the payment of the tithe, on the ground that it was covered by a modus, and he tendered evidence to prove the existence of such a modus.

The Court rejected the evidence, being of opinion that they had no power to try the question.

Where a person who had been summoned by two justices under the 7 & 8 W. 3. c. 6. s. 1. appeared before them, and was ordered to pay the tithes demanded, and did not raise any question of modus, but afterwards appealed to the sessions, and there, for the first time, set up a modus, and tendered evidence to prove it: Held, that the justices at sessions might, in the exercise of their discretion, reject the evidence.

Semle. That the power of justices to try questions of tithe under 7 & 8 W. 3. c. 6. is raised.

It is taken away by the eighth section of that act, where a question of modus is raised.

Croft,

Given in support of the order of sessions. The decision in this case was right. First, Because the 7 & 8 W. 3. c. 6. (A) did not give to the justices at sessions,

(a) By the first section of that statute, it is enacted "that all persons

shall well and truly set out and pay the small tithes, and compositions and agreements thereto, with all offerings, oblations, and obventions, to the several rectors, vicars, and other persons to whom they are due, in their several parishes, according to the rights, customs, and prescriptions commonly used within the said parishes respectively; and if any persons

subtract or withdraw, or anyways fail in the true payment of such small tithes, &c., by the space of twenty days at most after demand thereof, the person to whom they are due, shall be at liberty to file his complaint in writing to two or more justices of the peace within the county, and where the same shall grow due, (neither of which justices is to be the patron of the church or chapel whence the said tithes arise, nor anyways interested in such tithes)." The seventh section enacts, "that any person finding himself aggrieved by any judgment to be given by any two justices of the peace, may appeal to the next general quarter sessions, and the justices there present, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment given by the first two justices if they shall see cause, &c.; and if the justices shall find cause to confirm the judgment, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress, and sale of his goods and chattels, as to them shall seem just and reasonable; and no proceedings or judgment had or to be had by virtue of this act, shall be removed or superseded by writ of certiorari or other writ, unless the title of such tithes, &c. shall be in question." The eighth section enacts, "that where any person or persons complained of for subtracting or withholding any small tithes, or other duties aforesaid, shall, before the justices of the peace to whom such complaint is made, insist upon any prescription, composition, or modus decimandi, agreement or title whereby he ought to be freed from payment of the said tithes, &c. he shall, and deliver the same in writing to the said justices of the peace, who shall then give to the party complaining reasonable and sufficient security to the satisfaction of the said justices to pay all such costs and damages as, upon a trial at law to be had for that purpose in any of his Majesty's courts having jurisdiction of the matter, shall be given against him in case the said prescription, composition, or modus decimandi shall not upon the said trial be allowed; that, in that case, the said justices of the peace shall forbear to give any judgment in the matter, and that then, and in such case, the person or persons so complaining shall be at liberty to prosecute such person or persons for their said subtraction in any other court or courts whatsoever where he might have sued before the making of this act."

any

MIMI

Knutson
Spang
Hemmel

property. In the first instance, but a session will break in upon any of the cases which have been referred to in arguments, and which are distinguishable from the present upon the grounds already stated by my Brother *Bayley*.

Judgment for the Plaintiff.

The King against Jeffreys;

TWO justices, by an order, dated the 5th day of November, 1821, ordered *Jeffreys* to pay to the lessor of the tithes of the parish of *Glensford*, in the county of *Suffolk*, the sum of 6*l.* for his tithes of milk and calves, arising in the parish of *Glensford*, and due to the tithes, together with his costs and charges. *Jeffreys* was duly summoned to answer the complaint of the lessor, and appeared before the justices, but offered no evidence of a modus. The sessions, on appeal, confirmed the order, subject to the opinion of the Court upon the following case:

The respondent having proved the notice, summons, and order, and his title as lessee, and that the value of the tithe was of the amount demanded; the appellant insisted to be exempted from the payment of the tithe, insisting that it was covered by a modus, and he tendered evidence to prove the existence of such a modus. The Court rejected the evidence, being of opinion that they had no power to try the question.

Semle. That the power of justices to try questions of tithes under 7 & 8 W. 3. c. 6. is taken away by the eighth section of that act, where a question of modus is raised.

Cooper,

Where a person who had been summoned by two justices under the 7 & 8 W. 3. c. 6. s. 1. appeared before them, and was ordered to pay the tithes demanded, and did not raise any question of modus, but afterwards appealed to the sessions, and there, for the first time, set up a modus, and tendered evidence to prove it: Held, that the justices at sessions might, in the exercise of their discretion, reject the evidence.

Semle. That the power of justices to try questions of tithes under 7 & 8 W. 3. c. 6. is taken away by the eighth section of that act, where a question of modus is raised.

Cooper,

Cooper,

Cooper,

Storks, contra: The 1st clause of the act in question gives the justices power to act where rights, customs, and prescription are in question; now *custom* and *prescrip-*

tion

tion are particularly applicable to *modus*. Then the seventh clause gives us certiorari in cases where the title is in question. Now where a *modus* is set up, the title to the tithes is certainly in question. The only question is upon the 8th section. Is that there are no words of restriction; and if there were, it would nullify all the preceding part of the act; for in every case the jurisdiction of the justices might be ousted by some pretended *modus*; and the party applying to the justices might still be deprived of his statutory remedy, even after having obtained the judgment of a superior Court in his favour on the question of *modus*. The only way of putting a sensible construction upon the whole act is to say, that the magistrates below have authority to try all questions as to the tithes, subject to the right of removing them into this Court. With respect to the second point taken on the other side, there is no analogy between the case cited and this. The present rather resembles *Rex v. Commissioners of Appeal at Excise (a)*, where it was decided, that the commissioners were bound to hear evidence on the appeal which had not been brought forward at the original hearing.

ANNOY C. J. As at present advised, I am disposed to think that by *modus* in this statute, something different from title is meant. And as the word *modus* is not to be found in the 7th section, which relates to the certiorari, I think that the writ ought not to have issued. I am also disposed to think, that the 8th section is compulsory; that the party relying upon a *modus* shall not

(a) 5 M. & S. 153.

1803.

The King
v. The Parson
of St. Martin's

It is in the manner thereby directed. The defendant intended to apply to the court for a declaration of law as to the right to the tithes; that in such case the party entitled might have a compensation which could not be injurious to the party from whom the tithes are due. If the 8th section be not compulsory, this consequence will follow, that the party called upon to pay, may, by his will and pleasure, decide the question of modus to be tried by the justices, or may withdraw it from their consideration; whereas the other side can have no such option. This, however, is a point of great consequence, and I should have wished for more time to consider it, if our judgment proceeded upon that ground. But, upon the other point I entertain no doubt. If it was originally the intention of the party to set up a modus, he should have stated that before the two justices. In making a claim of tithes, the party would come prepared to shew the occupation of land by the party refusing to pay, and that titheable matter was produced. A question of modus is something quite distinct from that which the party claiming would come prepared to prove. If therefore, the modus was not set up in the first instance, the justices at sessions might exercise their discretion as to receiving or rejecting evidence of it. The claimant might otherwise be taken by surprise, and the defendant would obtain a very unfair advantage.

BAXTER J. My opinion is founded upon the last point. The justices at sessions had a right to exercise their discretion as to receiving or rejecting the evidence of modus, and I think that they came to a proper conclusion on that point. The party had a right of appeal against the decision of the two justices upon the evidence

laid

hid before them, he did not appear, and the appellants gave no notice of the grounds of his appeal, and, in the absence of any such notice, and of any mention of the issues in the first instance, before the two justices, and that the justices exercised a sound discretion when they rejected the evidence tendered.

Order of Sessions affirmed.

The King v. Hodgman, &c. a Plea &c. 517.

The King against DEVONSHIRE.

SAME against HUMPHREY WILLIAMS.

INFORMATION, in the nature of quo warranto, calling upon the defendant, *Devonshire*, to shew by what authority he claimed to have and exercise the office of capital burgess of the borough of *Truro*. The plea set out various parts of a charter granted by Queen *Elizabeth* relating to the constitution of the corporation, and the election of the mayor, aldermen, steward, capital burgesses, and recorder, (which it is unnecessary to insert here, as they are fully stated in the judgment delivered by the Lord Chief Justice,) and then averred that *J. J.*, a capital burgess of the said borough, died, and that the mayor and the major part of the capital burgesses, surviving and remaining at the time of the death of the said *J. J.*, duly met and elected him (*Devonshire*) to the office. Replication, That the mayor and eleven

Where the charter of a corporation provided that, "when any one or more of the capital burgesses for the time being should die, or dwell without the borough, or be removed from his office, it should be lawful to the other capital burgesses at that time surviving and remaining, or the greater part of the same, of whom the mayor was to be one, to elect another, or others of the burgesses of

the said borough, into the place or places of the capital burgess or burgesses so happening to die, &c." Held, that a majority of the entire body of capital burgesses, and not merely of those then surviving, must be present to make a good election under that clause.

capital

1893!
 The King
 Against
 Demurrer

capital burgesses, and no more, were present at the said meeting. 10thly, That by the charter two aldermen were required to be present at all elections of officers; and that two were not present at the time of the supposed election of the defendant. This replication set out parts of the charter relating to the election of a recorder, upon the death or amotion of any person filling that office; and also the mode of electing a coroner and constables. (These were fully stated in the judgment of the Court.) Demurrer and joinder. The pleadings in *Rex v. Williams* were the same, except that the election of the defendant was alleged to have been made by the mayor and the major part of the capital burgesses *surviving and remaining at the time of the election*.

The case was argued in *Hilary* term, 1892, and again in this term.

Tindal, in support of the demurrer, contended, first, That, under the words of this charter, it was not necessary that a majority of the whole body of capital burgesses should attend. The words *surviving and remaining* distinguish this from *Rex v. Belringer* (a), and all that class of cases; and *Rex v. Hoyte* (b) shows that the election was a good one, as a majority of the existing body did attend. The mayor, being one of the capital burgesses, the whole number besides him would be twenty-three, *Rex v. Thornton* (c); and, therefore, when J. J. died, the mayor and eleven capital burgesses, whom the replication admits to have been present at the meeting, would be a majority of the existing body.

(a) 4 T. R. 810.

(b) 6 T. R. 430.

(c) 4 East, 294.

Secondly,

Secondly, The words of the charter, requiring two aldermen to attend at the election of officers, do not apply to this case. A capital burgess is one of the corporation itself, and not an officer within the meaning of that clause. The clause directing his election does not in terms require the attendance of the aldermen; but the clause as to the election of recorder does expressly make their presence necessary.

1834.

THE KING
against
The Corporation

Cross, contra, contended, that, according to the principle laid down in *Rex v. Bellringer* (a), recognized and confirmed in *Rex v. Miller* (b), *Rex v. Morris* (c), and *Rex v. Bower* (d), where an election is to be made by a definite body in a corporation, the greater part of that entire body must attend, notwithstanding the introduction of the words *for the time being*, or others of the like import. The words *surviving and remaining*, in this charter, are manifestly used in the same sense as *for the time being*, for those expressions are indiscriminately introduced into various parts of the charter. Secondly, Capital burgesses are within the meaning of the word *officers*, so as to make the presence of two aldermen necessary at the election. The word *office* is applied to capital burgesses throughout the charter.

Cur. adv. vult.

The judgment of the Court was now delivered by

ABRAHAM C. J. By the pleadings in these cases, it appears that there are in the borough of *Truro*, a mayor, a certain definite number of capital burgesses, and four

(a) 4 T. R. 810.

(b) 6 T. R. 268.

(c) 4 East, 17.

(d) Ante. 492.

aldermen,

1884

**The King
v. The
Borough**

aldermen being part of that number of capital bur-
gesses, whatever that number ought to be. That upon
a vacancy occasioned by the death of one of the capital
burgesses, the defendant was elected to an assembly
consisting of the mayor and eleven capital burgesses.
In one of the cases it is alleged that this number of
eleven was a majority of the whole number of capital
burgesses who were surviving and remaining at the
time of the happening of the vacancy, which the de-
fendant was elected to supply; and in the other of the
two cases it is alleged that this number of eleven was a
majority of the whole number who were surviving and
remaining at the time of the defendant's election. It
further appears, that in fact there were not among those
eleven capital burgesses any two who were also alder-
men of the borough. There may be a doubt, whether
the number of capital burgesses in this borough ought
to be twenty-four, including and reckoning the mayor
as one of the twenty-four; or, whether it ought to be
twenty-four exclusive of the mayor, and, therefore,
making, with him, the number of twenty-five; but this
point is not material to the present case. In these
cases two questions of law have arisen; first, Whether
it be necessary that an assembly for the election of a
capital burgess should consist of such a number of per-
sons, including the mayor, as will be more than half the
number of twenty-five or twenty-four, or, not including
the mayor, will be more than half the number twenty-
four or twenty-three; for if a majority, according to
either of these reckonings, be necessary, then the number
of persons assembled, being twelve only, including
the mayor, was insufficient. The decision in the case

of

of the King's Bench (a) is not an authority for the present case; and it is not necessary to consider whether the construction which the Court appears to have been inclined to put upon the charter of *Nottingham*, in that case, as to the requisite number of aldermen, be or be not correct; though it may be proper to observe, that the provisions of that charter, as they regard a point of this kind, are materially different from the charter of *Tewkesbury*.

1823
THE KING
v. THE
BISHOP OF
DURHAM

Secondly, whether it be necessary that of the persons assembled, whatever their number ought to be, there should be at least two in whom the office of alderman is united with the office of capital burgess; for if this be necessary, then the assembly, however sufficient in point of number, was incompetent in regard to the official character of the persons of whom that number was composed.

This is the case of a borough constituted under an existing charter of the crown, which is set forth in the pleadings; and, therefore, each of these two questions is to be answered and resolved by the language of the charter; and, upon consideration of the charter, we are of opinion, that the assembly at which the defendant was elected was insufficient in point of number; and it is, therefore, unnecessary to give any opinion on the second question.

The number present was not a majority, according to either of the methods of reckoning before mentioned; and it has therefore been argued, that, according to this particular charter, it is not necessary that the assembly should consist of such a majority; but that, according

(a) 4 East, 294.

1898.

~~1898.~~
~~1898.~~
~~1898.~~

to the allegations in one of the cases, it is sufficient if the assembly consist of such a number of capital burgesses as will constitute a majority of the whole number of capital burgesses, who, at the time of the vacancy occurring, may happen to be surviving and remaining; and that, according to the allegations in the other case, it is sufficient, if the assembly consist of a majority of the whole number, who, at the time of assembling, may happen to be surviving and remaining.

Now it has been decided, in the case of *The King v. Bellringer* (a), and others quoted at the bar; that, where, by the provisions of any charter, an election is to be made by a body consisting of a definite number (as distinguished from a body consisting of an indefinite number) for the time being or the major part of them, as of a mayor and aldermen, mayor and capital burgesses, mayor, aldermen, and capital burgesses for the time being (or the like) or the greater part of them; a good elective assembly cannot be had without the presence of such a number of persons as will constitute a majority of the entire definite number, although the number present may constitute a majority of so many of the entire number as may happen at the time to be surviving and existing. From the time of the decision of the case of *Rex v. Bellringer*, this has been taken as a general and established rule of corporation law; and it appears by the report to have been so understood and considered before that time. The reason of the rule I take to be this; where the crown has by its charter constituted a corporate body, or any integral part of a corporate body (if as usual the whole corporation consists of several parts)

(a) 4 T. R. 810.

parts)

parts) composed of a certain defined and specified number of individuals, and has by the same charter given certain powers and authorities to a body so constituted, and has ordained a method of supplying vacancies from time to time, so as to give perpetual existence to the body, notwithstanding the necessary failure of its individual members: it cannot be supposed that the crown intended that the powers and authorities so given to a body consisting of such a defined number of persons, should be exercised by a much smaller number, as by only two or three, or that the individuals composing the body should at their pleasure increase their personal influence and authority, by suffering a gradual diminution of their number, and forbearing to exercise the power of renovation and supply, for which a method has been ordained. If you extract from a charter a single sentence expressed in the words that I have mentioned, as for instance, "It shall and may be lawful for the mayor and aldermen of the said city for the time being, or the greater part of them," from time to time to make an election of an officer, or do any other act, and look at the sentence so extracted, singly and by itself, it may stand doubtful, whether the words "or the greater part of them," ought, in construction, to be referred to the first part of the sentence, that is, to the words "the mayor and aldermen of the said city," so as to denote the greater part of that number of individuals, whereof the mayor and aldermen originally consisted; or whether they ought, in construction, to be referred to the whole of the preceding words, that is, "the mayor and aldermen of the said city for the time being," so as to denote only the greater part of the number of individuals whereof the body of mayor and aldermen may happen

1824
 The King
 and
 the Mayor
 of the City

1828.

The King
vs.
The Corporation
of Truro.

at the particular time to consist. But if, instead of extracting such a sentence from the charter, and viewing it singly and by itself, you look at it in context and conjunction with the whole instrument, as most undoubtedly you ought to do, the doubt is cleared up by the manifest intention of the crown, and by the departed sense that intention, that must necessarily ensue, if you give to two or three persons the authority originally given to twelve or twenty-four. A rule, as reasonable, having been established, it is, in our opinion, incumbent upon the Court to abide by and enforce it, and for the prevention of litigation, to extend rather than to narrow it, and on no account to depart from it, unless the language of a particular charter, or a long usage, leading to the presumption of a charter so expressed, by such state conduce plainly to a different exposition. And this brings me to the consideration of the language of the particular charter of *Truro*, as set forth upon the record in these cases. The charter is set out partly in the plea and partly in the replication, and, therefore, we have not so ready and commodious a view of it, as we should have, if the whole had been set out at once, and in the order of the original. But I think we have a sufficient knowledge of its contents for the purpose of a judgment, on the points before us. The charter begins by ordaining that the borough shall be a free borough, and that, from thenceforth for ever there shall be a body politic and corporate, by the name therein mentioned, and that, from thenceforth for ever, there shall be in the borough twenty-four of the more honest and discreet inhabitants, who shall be helping and assisting to the mayor in all causes and matters touching the borough. A certain individual is afterwards named to be the first mayor, and twenty-four other

other burgesses and commoners named to be the first
 capital burgesses and commoners, and there was a statute
 appointed for supplying vacancies, and certain power
 appointed for the mayor and capital burgesses. So that
 the intention of the statute added to the body
 consisting of twenty-four individuals to exercise the
 powers given by the charter is clear and manifest. The
 charter containing two clauses for supplying vacancies in
 the members of the capital burgesses. The first is ge-
 nerally applying to all cases of vacancy, whether by death
 or removal. The second is confined to cases of vacancy
 occasioned by removal. The vacancy upon which the
 defendant was elected was occasioned by death, and his
 election is therefore, under the first of the two clauses,
 which it is followed. And the said queen by her letters
 patent, did bestow her heirs and successors, did will
 and give to the said mayor and capital burgesses
 of the borough aforesaid, and their successors, that when
 and so often as it should happen, that any one or more
 of the aforesaid twenty-four capital burgesses or coun-
 sellors of the same borough for the time being should
 die or should, without the aforesaid borough, or should
 be for any cause removed from his office of capital
 burgess or councilor, that then, and so often, it should and
 might be lawful to the other capital burgesses of the
 aforesaid borough at that time surviving or remaining,
 or the greater part of the same, of whom the said queen
 was willing that the mayor for the time being should be
 one to elect, nominate, and prefer another or others of the
 burgesses of the borough aforesaid into the said vac-
 places and him or them, the same burgesses or councilors
 could be capital burgesses or councilors, and so on
 passing vacants has been made, and others as aforesaid

1838.

The King
against
Barnardiston.

elect and preferal, having first taken a corporal oath before the mayor of the borough aforesaid for the time being, should be of the number of the aforesaid twenty-four capital burgeses and councilless, and that no bill as the case should happen. Upon this clause it has been contended on the part of the defendant, that the words, "at that time surviving or remaining," are the greater part of the same, to denote plainly that the choice may be made at an assembly consisting of a majority of the number actually surviving and remaining at the time of the vacancy in one of the estates, and at the time of assembling in the other, although less than a majority of the entire definite number when full and complete; and that the insertion of these words distinguishes the present case from all those to which we have alluded, wherein the words were, "for the time being."

On the other hand it has been contended on the part of the crown, that these words, "then surviving and remaining," are precisely of the same import and meaning as the other words *for the time being*, and we are of that opinion. This charter, like all other instruments, may be best expounded by itself. No reason can be assigned for allowing a capital burges to be chosen by a less number of persons, than is required for the choice of a mayor, alderman, steward of the court, coroner, or constable, each of whom is to be chosen by the same body; and if there be no reason whereon to found a distinction, a distinction ought not to be made without words plainly denoting that a difference was intended. The office of alderman is, in this corporation, an equal office; and by the charter, the aldermen are to be chosen yearly out of the twenty-four capital burgeses by the major part of the same twenty-four capital burgeses.

1823

The Mayor
and Capital
Burgesses

burgesses. The clause appointing the choice of mayor is this, "The mayor and capital burgesses for the time being, or the greater part of them from time to time, shall have power yearly, on the 2^d of October of most assembling, and shall and may nominate one man, being an alderman, before the other aldermen and capital burgesses of the borough then and there present, to be the mayor for one year then next following." The clauses for electing a coroner and constables are precisely of the same import as this for the election of mayor. The clause for appointing a steward of the court is to this effect: "The mayor and capital burgesses, or the major part of them, (without the words *for the time being*), of whom the mayor for the time being to be one, from time to time, whenever it shall please the mayor and capital burgesses, or the major part of them, shall have authority to nominate a person learned in the law to be the steward of the court of the borough. These five elections must therefore, according to the decisions referred to, be made at an assembly consisting of a majority of the entire definite body.

The only other officers of whom the election is specially directed by the charter, are the recorder and the capital burgesses. The charter contains two clauses as to each of these elections, and (which is very remarkable) with a similar variation of phrase as to each. No person appears to be named to the office of recorder in the charter. The first clause for the election of that officer is to this effect: "The mayor, aldermen, and capital burgesses, or the greater part of them *for the time being*, from time to time, as and when it shall be necessary, may and shall have power whenever and as often as it shall please them, or the greater part of

1825.

The King
against
Devonshire.

them, to elect a fit person to be recorder, to execute the office of recorder as long as he shall conduct himself well in the said office. This clause is apparently sufficient to provide for the election, not merely of a first recorder, but of a succession of recorders, and an election under this clause must, according to the decisions, be made at an assembly consisting of the majority of the entire number; unless it shall be held, that a different construction is to prevail, if the words "for the time being" happen to follow the words, "or the greater part of them;" from that which has been given, where the words "for the time being" preceded the words, "or the greater part of them," which would introduce a subtle distinction never contemplated by the crown, or by those who have been entrusted with the framing of corporation charters, who have placed these words sometimes in one order and sometimes in another.

There is, however, another clause directing the election of a recorder in the cases of the death or removal of that officer; and that clause is to this effect: that when and so often as it shall happen that the recorder shall die, or be removed from his office, then and so often it shall be lawful for the mayor and capital burgesses of the borough then *surviving and remaining*, or the greater part of them, (of whom the mayor to be one,) another discreet man in the place of him so happening to die or be removed, to elect and prefer. Now, as no sufficient reason has been given, or can be, for a variation in the constitution of the elective assembly in this case of a recorder, even supposing the first clause to be confined to the election of the first recorder, it may be concluded that the sense is the same although the

the phrase be varied. Then, as to capital burgesses, which is the office in question, there is, in addition to the general clause that I have already quoted, another clause, confined to a choice in case of vacancy by amotion, which is to this effect. The mayor and burgesses (that is, the corporation generally,) shall have power by the common council, (that is, the mayor and capital burgesses,) or by the greater part of them, (without the words *for the time being*), any one or more of the capital burgesses for the time being, for any cause to them or the greater part of them seeming reasonable, from his office of capital burgess to remove, and in the place or places of such capital burgess or burgesses any one or more of the burgesses and inhabitants of the said borough to elect and prefer; and this when and so often as it shall happen, or to the mayor and capital burgesses, or the greater part of them, *for the time being*, it shall seem convenient, necessary, or fitting. According to this clause, if it stood alone, the election to supply a vacancy occasioned by amotion must, for the reasons before given, be by a majority of the entire definite number. And as there can be no reason assigned for a variation in the constitution of the elective assembly in the cases of vacancy by death and by amotion, and as each of the two clauses provides for an election in the case of vacancy by amotion, we conclude here also, that the sense of the two clauses is the same, although the phrase be varied. And this construction gives one plain and uniform rule for all the elections of all the corporate officers, appointed by this charter to be elected by the same body of mayor and capital burgesses. Whereas a contrary construction would introduce a different mode of election to different offices, though, by

1833.

The King
against
Devonshire.

1821:
The King
vs.
The Justices
of the Peace
for the County
of Kent

the same class of elections, would allow two modes of election to the office of recorder, and two also to the office of capital burgess, on a vacancy by annuity, and would leave but one of those modes capable of being adopted on a vacancy by death. Now, this would be so useless, and so likely to lead to errors and mistakes, that it is impossible to suppose it can have been intended by the crown. And therefore, as there does not appear any manifest intention in this charter to introduce a mode of election different from that which was used to be established by the charter in the case of *The King v. Bellringer*; and as it is desirable, for the reasons already given, to compel the members of a definite body in a corporation to keep up their full numbers; and as nice and subtle distinctions upon the language of instruments of the same general nature ought to be discountenanced, we are of opinion that the elective assembly in each of these cases was deficient in point of number; and, consequently, that judgment ought to be given for the crown.

Judgment for the Crown.

Wednesday,
May 7th.

Rex against The Justices of Kent.

By the 55 G. 3.
c. 58. s. 2.,
when a footway,
&c. is diverted
by an order of
justices, three

BY an order of two justices, bearing date the 20th of December, 1821, made under the 55 G. 3. c. 58, a public footway in the parish of *Elham*, in the county of Kent, was diverted, and the order is to be confirmed and enrolled in the quarter sessions held next after the expiration of four weeks from the first day of giving such notice: Held, that the compensation must be made from the first day of giving that description of notice which is last published: Held also, that an assent to the turning of the road, given under the hand and seal of an agent of the party through whose ground the new road is to pass, is insufficient.

Kent,

Kent, passing through the lands of *E. Wilgrass* and *W. Stace*, was diverted, and as the new footpath also passed through their lands, the old one was given to them in exchange. The order also stated that the owners of the land, through which the new footway was to pass, were consenting thereto in the manner required by law. Notices were published, in pursuance of the second section of 55 G. 3. c. 68 (4), and, at the quarter sessions holden for the county, on the 17th of January following, the order was confirmed and enrolled. Upon the enrolment it appeared, that *E. Wilgrass*, for herself,

1822,

The King
against
The Justices of
Kent

(a) By that section it is enacted, "that when it shall appear upon the view of any two or more justices of the peace, that any public highway or public bridleway or footway may be diverted so as to make the same nearer or more commodious to the public, and the owners of the lands and grounds through which such new highway, bridleway, or footway so proposed to be made, shall consent thereto by writing under his or their hand and seal, or hands and seals, it shall and may be lawful, by order of such justices at some special sessions, to divert and turn and to stop up such footway, &c.: provided that, in the several cases before-mentioned, a notice, in the form or to the effect of schedule A, (to this act annexed,) shall be affixed in legible characters at the place and by the side of the said highway, bridleway, or footway, from whence the same is directed to be turned, diverted, or stopped up; and also inserted in one or more newspapers published or generally circulated in the county where the parish, township, or place in which the highway, bridleway, or footway, so ordered to be diverted and turned, or stopped up, as the case may be, for three successive weeks after the making of such order; and a like notice shall be affixed to the door of the church or chapel of every parish or township in which such highway, bridleway, or footway, so ordered to be diverted, turned, or stopped up, or any part thereof shall lie, on three successive Sundays subsequent to the making of such order. And if the said several notices having been so published, the said order shall, at the quarter sessions which shall be holden within the limit where the highway, bridleway, or footway, so diverted and turned, or stopped up, shall lie, next after the expiration of four weeks from the first day on which such notice shall have been published as aforesaid, be returned to the clerk of the peace in open court, and lodged with him; and the said order shall, at such quarter sessions, be confirmed, and by the clerk of the peace enrolled amongst the records of the said court of quarter sessions."

And *T. Bicknell*, solicitor for *H. Stace*, gave their consent, under hand and seal, to the making of the new footway. A rule was obtained for quashing the original order, and also the order of confirmation, on the grounds, that the assent by *Bicknell* for *Stace* was insufficient, and that the confirmation and enrolment did not take place at the sessions, pointed out by the second section of the 65 G. 3. c. 69.

Searlett, F. Pollock, and *Sir G. Lewis*, shewed cause. By the third section of the act in question an appeal is given to any person grieved by such an order as the present. No appeal, however, was made against this order; it is, therefore, quite immaterial at what time the enrolment took place. The enrolment, however, was at the right sessions; for notice was affixed on the old road on the 20th of *December*, that day may, therefore, be included in the calculation, and then the sessions were not held until four weeks after the notice given. But even supposing the enrolment to be wrong, it is merely a ministerial act, *De Ponthieu v. Pennyfeather* (a); and the Court may decide that to be void without quashing the original order. Secondly, The want of consent under the hand and seal of *Stace* does not appear on the face of the order; and, therefore, the Court will not take notice of it.

Anstott C. J. Upon looking at this act, I have no doubt but that this Court must quash the order of sessions. What effect that will have upon the original order is a different question. By the second section, notice is required to be given in three modes; by affixing it by the side of the road; by advertisement in a

(a) 5 Taunt. 634. 1 Marsh. 261. S. C.

newspaper; and by affixing it to the church-door. It then proceeds: "And the said several notices having been so published, the said order shall, at the quarter sessions which shall be holden within the limits where the highway, bridle-way, or footway, so diverted and turned, or stopped up, shall lie next after the expiration of four weeks from the first day on which such notice shall have been published, be returned to the clerk of the peace, &c., and shall, at such quarter sessions, be confirmed; and, by the clerk of the peace, enrolled amongst the records of the court of quarter sessions." The notice can not be considered as given until it has been published once in each of the modes required by the act. The computation must, therefore, be made from the first day on which that description of notice shall be given which is last published. Here, four weeks had not elapsed between the *Sunday* on which notice was first affixed to the church door and the sessions where the confirmation and enrolment took place. It is of great importance that these notices should be correct; for, by the third section, an appeal is given to the same sessions at which the enrolment is to be made. In this instance, the confirmation and enrolment were made at a quarter sessions held before the requisite time had elapsed. Parties grieved were not bound to appeal then; and, if we were to hold the confirmation and enrolment good, they would be deprived of an opportunity of appealing at the subsequent sessions. That order must, therefore, be quashed.

BAYLEY J. I am of opinion that the order of sessions must be quashed, and the original order also. It should have appeared on the face of that order, that a sufficient assent was given under the hand and seal of *Stace*. The public

1828

The King
by His
Majesty's
The Judges of
K.B.

the sessions confirmed the order, subject to the opinion of the Court, on the following case. The pauper, M. Bolding, had gained a settlement, by hiring and service, in the parish of *Cherry Willingham* and was settled there at *May-day*, 1817. The pauper then contracted to become the groundkeeper of *John Hill*, in respect of his farm at *Hougham*. The master, by an entire contract, agreed to give the pauper 20*l.* a year, a cottage to live in, and the agistment and whole profits of one cow for his own services, and the sum of 28*l.*, and the agistment of and whole profits of another cow, in consideration of his lodging and maintaining in the cottage two of his (*Hill's*) labourers. The pauper resided under these terms in *Hougham*, during the year, taking the whole profits of the cows, receiving his wages, the allowance of 28*l.*, and maintaining the two servants. The annual value of the lands on which the two cows were depastured, exceeded 10*l.*; but the land necessary for one cow only, would not be of that value; (that is to say) the annual value of the agistment of two cows upon the land in question would be worth 10*l.* a year; but of one cow, would not be 10*l.* a year.

S. Phillips, in support of the order of sessions. One of these cows was kept for the convenience and benefit of the master. The possession of the pasturage of that one may be considered as that of the master; and that being so, the pasturage of the other is not of sufficient value to give a settlement.

Scarlett and Balguy, contra. The pauper had the exclusive enjoyment and possession of both cows, and he was not bound by the terms of his contract to feed his

1830

The King
against
The Inhabitants
of the
Parish of
CHERRY
WILLINGHAM.

1823.

The King
against
The Inhabit-
ants of
Chislet
Windsor.

his master's servants, with the milk of either. It is stated on the case, that the land upon which they depastured was worth more than 10*l.* per annum. The pauper, therefore, occupied a tenement of that value, and thereby acquired a settlement. *Rex v. Melbridge, (a)*

Cur. iude. vult.

ABBOTT C. J. now delivered the judgment of the Court. We have considered of this case, and we are of opinion that the pauper acquired a settlement in *Hougham*; and, consequently, that the order for his removal from that parish, and the order for confirmation are wrong, and that the rule for quashing them must be made absolute. The tenement in question is the pasturage of two cows. It is found that the annual value of the land whereon the two were depastured, exceeded 10*l.*; that the annual value of the agistment of the two would be worth 10*l.*, but of one, then not 10*l.* It was, therefore, contended in support of the orders, that although the pasturage of one of the cows must be considered as a tenement upon the authority of decided cases, yet that the pasturage of the other was not a tenement, and this upon a difference in the terms of the contract as set forth in the case. It is found that the contract was an entire contract, that the master agreed to give the pauper 20*l.* a year, a cottage to live in, and the agistment and whole profits of one cow for his own services; and the sum of 28*l.*, and the agistment and whole profits of another cow, in consideration of the pauper's lodging and maintaining at the cottage, two of the master's labourers. The question arose upon the cow

(a) 1 T. R. 598.

thus

thus last mentioned. Now, by the terms of this contract, the pauper does not engage to employ the milk of the latter cow in the maintenance of the labourers: he might, if milk formed a part of their diet, as it may be presumed to have done, have given the milk of the other cow, or he might have procured milk for them elsewhere, and might have sold or otherwise disposed of the milk of both the cows provided by his master. So that we cannot say the milk was given or appropriated for the maintenance of the labourers; but must say, that it was given in consideration of the maintenance of the labourers. "And the consideration given or paid for a tenement, is wholly immaterial on a question of settlement, if the yearly value be 10%. Whether the consideration be paid in money, or by services rendered, or by any other matter, beneficial to the party receiving, was of no importance at the time in question, which was before the statute 59 G. 3. c. 50. We, therefore, think that the difference, as it was called in the terms of this contract, does not lead to any legal distinction which can justify us in saying, that the agistment of the latter cow was not a tenement.

Both orders quashed.

1823.

The King
against
The Inhabit-
ants of,
Coppat
Willingham.

1809.

—
 —
 —
 —
 —

the owner of the whole ship; that he was known to the world as such; and that, though he conveyed three-fourths to the defendant, nothing was done to make it notorious to the world that there had been any such conveyance, or any change of property; but that the defendant, from the time that he became true owner of three-fourths, and after he ought to have made that notorious, suffered the bankrupt to continue to the world, down to the period when he became bankrupt, apparent owner of the whole. I think, therefore, that the three-fourth shares of the ship, at the time of the act of bankruptcy, were in the order and disposition of the bankrupt, with the consent of the true owner; and that the case, as to those three-fourths, is within the statute of James; and, consequently, that the judgment of the Court must be for the plaintiff.

HOLRODGE J. I think that this case is within the words and the mischief contemplated by the statute. The bankrupt, in the first instance, being the sole owner of the ship, conveyed the true ownership of part to the defendant. The latter, however, permitted the bankrupt to continue to have the possession, and to act and to appear to the world as the true owner of the whole. It has been decided, in several cases, that a ship, like other personal property, is within this clause of the statute of James. The purpose of the provisions of the register acts is, not to shew in whom the actual possession or apparent ownership is, but merely to compel persons to comply with certain forms in transferring property in ships, whereby government shall see who are the real owners. It does not follow from those acts that a person cannot be liable, as owner, for debts incurred on account of
the

Kent, passing through the lands of *E. Wilgress* and *W. Stace*, was diverted, and as the new footpath also passed through their lands, the old one was given to them in exchange. The order also stated that the owners of the land through which the new footway was to pass, were consenting thereto in the manner required by law. Notices were published, in pursuance of the second section of 55 G. 3. c. 68. (a), and, at the quarter sessions holden for the county, on the 17th of January following, the order was confirmed and enrolled. Upon the enrolment it appeared, that *E. Wilgress*, for herself

1800,
The King
against
The Justices of
Kent

(a) By that section it is enacted, "that when it shall appear upon the view of any two or more justices of the peace, that any public highway or public bridleway or footway may be diverted so as to make the same nearer or more commodious to the public, and the owners of the lands and grounds through which such new highway, bridleway, or footway so proposed to be made, shall consent thereto by writing under his or their hand and seal, or hands and seals; it shall and may be lawful, by order of such justices at some special sessions, to divert and turn and to stop up such footway, &c.: provided that, in the several cases before-mentioned, a notice, in the form or to the effect of schedule A, (to this act annexed,) shall be affixed in legible characters at the place and by the side of the said highway, bridleway, or footway, from whence the same is directed to be turned, diverted, or stopped up; and also inserted in one or more newspapers published or generally circulated in the county where the parish, township, or place in which the highway, bridleway, or footway, so ordered to be diverted and turned, or stopped up, as the case may be, for three successive weeks after the making of such order; and a like notice shall be affixed to the door of the church or chapel of every parish or township in which such highway, bridleway, or footway, so ordered to be diverted, turned, or stopped up, or any part thereof shall lie, on three successive Sundays subsequent to the making of such order. And the said several notices having been so published, the said order shall, at the quarter sessions which shall be holden within the limit where the highway, bridleway, or footway, so diverted and turned, or stopped up, shall be, next after the expiration of four weeks from the first day on which such notice shall have been published as aforesaid, be returned to the clerk of the peace in open court, and lodged with him; and the said order shall, at such quarter sessions, be confirmed and by the clerk of the peace enrolled amongst the records of the said court of quarter sessions."

1853.

The King
vs. The Corporation of
Manchester and Salford,
for an Infringement of
the Statute in relation to
Road Works.

upon all the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brewhouses, and other buildings, gardens or garden ground, and other tenements in the towns of *Manchester* and *Salford*. The statute does not adopt the language of the 48 *Elizabeth*, "lands and houses," but enumerates the different properties which I have specified. It does not use the word "land," which is used in the statute of *Elizabeth*, but it uses the word "tenements," which that statute does not use. The decisions, therefore, upon the statute of *Elizabeth* will not govern this case, unless the word *tenements* here is used in as comprehensive a sense as the word *lands* there. This is an act for cleansing, lighting, watching, and regulating the streets, lanes, passages, and places within the towns of *Manchester* and *Salford*; and a chief object appears by the recital to be, to provide for the peace, security, and accommodation of the inhabitants of the towns and of persons resorting to and passing through them. The occupier of any messuage, dwelling-house, warehouse, or other building, or of any other tenement within either of the towns, of the yearly value of 50*l*, is a commissioner. The word "tenement" occurs in this part of the act, and is altogether associated with words which denote buildings. Section 39., which gives the power of rating, directs the commissioners to ascertain every year the sums to be raised by rates on the inhabitants of *Manchester*, and by rates on the inhabitants of *Salford*, as if *inhabitants* were to be the persons rated; and in addition to such words as denote buildings, and the general words tenements, introduces the words "gardens and garden grounds, and other tenements." By s. 40. the demand of the rate is to be left

at the dwelling-house or *tenement* occupied. And by section 48., it is recited, that several messuages or dwelling-houses, warehouses, or other buildings or *tenements* in these towns, are let out in lodgings or *tenements* to divers tenants, and that it would be difficult to rate the occupiers, or recover their rates, and provision is made for rating the landlord of every such messuage, &c., of the yearly value of 4*l.* 10*s.* or upwards, which shall be so let. These are some of the instances in which the word *tenement* is used in this act; and from these instances and the object of the act, it may be collected, in what sense it uses that word. The omission to use the obvious and general word "lands," and yet introducing "gardens and garden-grounds," implies, that "lands" in general were not intended to be rated. The object of the act was, to give security and accommodation to the residents and to their property. The inhabited houses, therefore, and every thing connected with residence or trade, as they were to have the advantage, were to be liable to the charge. The houses, warehouses, shops, and all other buildings, were to be rated, because they all had protection. But why were gardens and garden-grounds to be included, if lands in general were not? possibly, because the produce thereof was of value, and was a probable object of depredation, and the general lighting and watching of the towns would give so much additional protection to this species of property, as might properly make it the subject of charge. Gardens, therefore, and garden-grounds, may, on this account, be distinguished from other descriptions of land, and may be subjected to this charge, whilst land in general is exempt. Pasture-ground, for instance, stone-quarries, and other kinds of real property, though in-

1843.

The King
against
The Managers
of the
Towns and
Roads
Works Co.



cluded in the 48. Eliz. as affording income, and supplying, therefore, the means of contribution, are omitted in this act, because such property derives no equivalent or material protection from it. Upon the ground, therefore, that this statute does not use the comprehensive word *land*, and uses the word *tenant* in a very limited sense only, and not in a sense to include the property in question, we are of opinion that this property was not liable to be rated, that it ought to be expunged from the rate, and that the order of sessions must be quashed.

Order of sessions quashed.

The King against The Inhabitants of HAWORTHINGHAM.

A. built a house on the waste of a manor by licence from the lord, resided in it two years, and then sold it to B. The latter sold it to C. for 30*l.*, but no conveyance was executed. C. resided in it five years, and paid 1*l.* per annum rent to the lord, and then sold his interest. No adverse claim was made:

Held, that although C. paid a consideration of 30*l.* when he purchased his interest, he did not acquire by purchase an interest or estate sufficient to confer a settlement upon the statute 9 G. 1. c. 7. s. 5.

UPON an appeal against an order of two justices, whereby E. Turner, his wife and family, were removed from the parish of *Stainton*, by *Langworth*, in the county of *Lincoln*, to the parish of *Haworthingham*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:

In the year 1798 certain commissioners, in pursuance of an act of parliament for the inclosure of the parish of *Haworthingham*, made their award, and allotted to the Earl of *Manters*, as the lord of the manor of *Haw-*

worthingham,

Magnorthingham, an allotment, as a full compensation for his right and interest in the soil of the open fields and commonable and waste lands within the manor. In the year 1809, one *Goodwyn* applied to Lord *Manners* for leave to build a house upon the waste, in the parish of *Magnorthingham*. Lord *Manners* gave him liberty, in writing, to build a house on the place in question. *Goodwyn* built there, on the waste by the road-side, in the same year, a blacksmith's shop, which two years afterwards he sold to one *Bayley*, who sold it to the pauper for 80*l*. No deed of conveyance was executed to the pauper. The pauper converted the shop into a dwelling-house, where he resided during five years, and then sold it to one *Wright* for 34*l*. The pauper continued to live therein as tenant to *Wright* for two years longer. During the five years that the pauper resided in the house as owner, he paid 1*s*. a year to Lord *Manners*, as lord of the manor. The surveyor of the highways once demanded this 1*s*. to be paid to him, but it was never so paid. On the pauper quitting the house *Wright* went to live there, and it is let by *Wright* to a tenant for 2*l*. 18*s*. a year at the present time. No adverse claim has ever been made.

Nolan and *Pattern*, in support of the order of sessions. The pauper acquired a settlement in the parish of *Magnorthingham*, by having purchased an interest in land for a consideration amounting to 80*l*. By such purchase he acquired the interest which *Goodwyn* once had. The latter, by building a house on the land, by the leave and with the knowledge of the lord of the manor, acquired an equitable estate in the land; *See*

1826

The King
against
The Inhabitants
and
Hagworth
Ingham.

think the enquiry into that point unnecessary in this case, because, upon the facts stated, and on the authority of the case of *Ray v. Hornsby* on the 11th (18) we think there has been no purchase of any estate or interest of which we can take notice. It is stated in the case, that the pauper, after his purchase, paid a year to Lord *Ellenborough*; but no such payment appears to have been made, either by *Bayley*, who sold to the pauper, or by *Goodwyn*, who erected the building and sold to *Bayley*. Therefore, although the pauper might, in consequence of this payment, have acquired the character of a tenant from year to year, yet there is nothing to give that character either to *Bayley* or *Goodwyn*, and the matter purchased by the pauper is the same as in the case referred to. It was there decided, that a licence to occupy does not operate as a grant, nor confer any legal title, and as to equitable right or title, the observations made by Lord *Ellenborough* are unanswerable: "We cannot take into our consideration what it may be conjectured a court of equity would determine in this case. Perhaps a court of equity might interfere, but can we say with certainty that it would? We ought to see that the party has clearly an equitable interest, and not merely such a claim as might possibly induce a court of equity to interpose in some way or other." Upon the ground, therefore, that this was not a purchase of any estate or interest in the land or building, we are of opinion that no settlement was gained.

Orders of sessions quashed.

1821.

1821.

1821.

1821.

1821.

Doe on the several Demises of William Orpe and John Orpe against John Frost.

A testator devised to his two daughters, *E. F.* and *A. M.*, certain lands therein described, to be equally divided between them at the time of his decease, and at the time of the death of either daughter, her share of the land was to be equally divided between her children; but if his daughter *A. M.* died without issue, then her share of the land was to go to his daughter *E. F.*, and at her decease to her children, share and share alike; and all the residue of his real estate he devised to his son; but if he died without issue, then the son's share of the real estate was to go to all

EJECTMENT on the demise of *William Orpe*, on the 2d *March*, 1821, for the term of *seven years*, and also a demise from *John Orpe*, on the 2d *March*, 1821, for the same term. At the trial before *Richard C. B.* at the Summer assizes, 1821, for the county of *Dorset*, the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following assumpsit:

John Massey, being seized of the lands and tenements in the declaration mentioned, by his will, bearing date the 29th *October*, 1799, devised as follows: I give to my two daughters, *Elizabeth Frost* and *Ann Massey*, the breach field, intake, and the birches and lands formerly taken out of the breach field, now lying together and called the *Birches*, and the alder close, to be equally divided between them at the time of my decease; and at the death of my daughter *Elizabeth*, her share of land to be equally divided between her children; and at the time of my daughter *Ann's* decease, her share of land to be equally divided between her children; but if *Ann Massey* dies without issue, then I give her share of land

the testator's grandchildren that should be then living, share and share alike. And he further directed that such share of such lands as he had bequeathed to his daughter *E. F.* and *A. M.*, and likewise such shares of such money as might happen to become due by virtue of his will to his grandson and granddaughter *R.* and *H. F.*; the children of *R. F.*, should be placed in the hands of their brother *J. F.*, his heirs and assigns; and the rents, issues, and profits of such share of lands, and the interest for such share of money, to be paid to them during their natural lives, and after their decease to be equally divided among his or her children if any, if not, to become the property of his or her heirs or assigns for ever; nevertheless that *J. F.* might, if he thought fit, deliver up or pay to the said *R. F.* at any prior period all or any part of his share, for his maintenance or advancement in the world, unto the only proper use of *R. F.*, his heirs and assigns for ever: Held, that the children of *E. F.* took a fee.

1898
 ———
 Sub. ch. 1
 Sub. ch. 2
 Sub. ch. 3
 Sub. ch. 4

of this said Robert Frost, his heirs and assigns for ever. The lands mentioned in the will are to be divided equally said John Massey to his daughters, Ann Massey and Elizabeth Frost, and the lands and hereditaments mentioned in the plaintiff's declaration. John Massey died after making his will, testis both then and at the date of the will, of other lands besides the lands specifically devised to his daughters, Ann Massey and Elizabeth Frost, and leaving them, and also another daughter, Sarah Orpe, wife of William Orpe, and Bartholomew Massey, (his only son and heir), named in the will, his only children then surviving. Ann Massey died unmarried, without issue, and Elizabeth Frost became entitled to and possessed of the entirety of the lands devised to her and her sister by the will. She left three children, J. M. Frost, (described in the will as John Frost), Robert Frost, and Elizabeth Frost, the wife of Wm. Frost, and they, upon her death, became possessed of the same premises. J. M. Frost died in the month of January, 1899, and devised his interest in the same lands with the defendant in fee, who was his eldest son and heir at law. Bartholomew Massey, the son and heir at law of the testator, died in the lifetime of Elizabeth Frost, unmarried and without issue, leaving Elizabeth Frost and Sarah Orpe, his only sisters and co-heiresses at law. By his will he devised all his real estates to trustees for a term of 99 years (which is since determined), and after the determination of that term to his nephew, William Orpe, in fee. The lessors of the plaintiff were two of the grandchildren of John Massey, the testator, living at the time of the death of Bartholomew Massey, and it was admitted, that if the children of Elizabeth Frost did not take a fee under the will of John Massey,

in

in the lands devised to them, that the lessors of the plaintiff, in the events that had happened, were entitled to recover three eleventh shares of the third part in which the particular estate was determined by the death of John, the son of Elizabeth Frost. The case was argued at the sittings after last Hilary term by

MR. J. J. J.

MR. J. J. J.
MR. J. J. J.
MR. J. J. J.
MR. J. J. J.

Frost, for the plaintiff. By the devise of the land in question *Ann Massey* and *Elizabeth Frost* took estates for lives. On the death of *Ann* without issue, *Elizabeth* took the entirety for her life, and to be, at her death, divided among her children, share and share alike. There are not any words of limitation to either of these gifts: therefore the mother and children took only successive estates for life, and the children took, in their own right, as purchasers. The testator next gives the residue of all his real estate to *Bartholomew Massey*; and he became tenant in tail by implication, because the estate is given over if he should die without issue. This construction is necessary to give effect to the testator's general intention. Under that clause the grandchildren then living are not tenants in common in fee of the estates devised by the particular clause, because the residuary clause does not apply to the estates previously given; and even if it did apply, life estates only would pass, because there are not any words of limitation. It may be assumed to be clear, that the gift to the mother and her children did not create an estate-tail. *Wilde's case* (a), *Doe d. Liversage v. Vaughan*. (b) To make the gift carry an estate-tail the words of gift to the children must be taken as words of limitation; and

(a) 6 Coe, 16. b.

(b) 5 B. & A. 434.

3007-

Bartholomew
Frost
vs.
Easter Term

the children entitled to take by descent, and not by purchase. They might take by descent if the estates were given by one entire clause: but they never can take an estate tail where the interests are given, as they are in this case, by distinct clauses. *Hedges v. Hedges* (a) may be relied on, to show that this was an estate tail; but that case has never been followed in subsequent decisions as an authority. The testator, after giving the residue of his real estate to his son Bartholomew, and, in case of his death, to all his grandchildren that should be then living, shares and shares alike, directs that such of these last shares as shall belong to his granddaughters, Ellen Smith, shall be placed in the hands of her father, Wm. Orpe. It is clear that the testator alluded to those shares only which the children of Bartholomew were to take under the clause immediately preceding. In the next clause, he, indeed, speaks of the lands which he had bequeathed to Elizabeth Frost and Ann Masey, and of the shares of money which might happen to become due, by virtue of his will, to Robert and Hannah Frost, and he directs those shares to be placed in the hands of their brother, John Frost, the rents, issues, and profits of such shares and interest to be paid to them during their lives. In this clause the testator did not contemplate the real estate, but only the money and the interest is to be paid to them during their lives. It seems, therefore, that he meant that they should have life-interests only. Besides, if he meant to pass the real estate, who had the legal interest? There are not any words giving a fee to John Frost; and he can only take an estate of that extent by implication, and in order to execute the purposes of the trust. No

(a) Doug. 451.

case exists in which, under such circumstances, a fee has been implied. Besides, the will is not to be interpreted by ambiguous words; and if the Court should see a clear intention to give a fee to *Frost* and *Flower* *Pross*, it does not follow that both would take a fee, unless the intention for that purpose appeared clearly from the will itself. [By Mr. J. Suppose a testator devises an estate to A, B, and C, without using any words of inheritance; and by a subsequent clause says, "as to the estate before given to B and C, and their heirs, would not that explain the gift to A to be an estate in fee?" In that case the testator would have explained an intention, that by the former words he meant to give a fee; and a fee would have passed. But the testator assumes in this part of his will, that he had previously made *John Masey Frost* a trustee, while he had not accomplished, or, even as far as the language of the will extends, aimed to accomplish that intention; by the prior parts of his will.

These considerations. The children of *Elizabeth Frost* take a fee. The question in the present case is, not what estate would pass by the particular words of the devise standing alone; but whether, from the whole will, it is not to be collected that the testator meant to give a fee. In *Dunn v. Page* (a), Lord Mansfield says, "that there is hardly an instance where the words of a devise are restricted to a life-estate only, in which the intention of the testator is not contravened; and the courts have been astute to find out, if possible, from other parts of the will, the intention of the testator; and it is with pleasure they have found, in many cases, sufficient to

(a) 1 Bos. & Pul. 261. 11 East, 603.

1880-1

Deceased
Ors
Faint

warrant them in giving full effect to this intention. In the present will, the gifts to two of the children are directed to be held by their brother, his heirs and assigns, for their lives, and afterwards to go to their children, and after their deaths to be equally divided among their children, if any, or else, to become the several parts of his, or her, or their heirs and assigns. It is true, therefore, and his heirs, are, to be trustees for them, for their lives, and for their children, and if two children, they are to have a fee, and John is invested with a power of giving the fee directly to Robert. This plainly manifests the understanding of the testator that he had previously given a fee to two of the children. The trust imposed on John is merely with reference to the antecedent devise to Elizabeth's children, and a consequence of it; but that antecedent devise makes no distinction between John and the rest of the children. It gives to each the same interest, to be enjoyed by them share and share alike. The antecedent devise, therefore, must give a fee to all the children. Next, had the testator not expressed his meaning in the former devise, but the devise to John in trust were to be taken as a distinct limitation in fee of the shares of the other children, there is sufficient reason for the Court to supply words of limitation for the benefit of John. The devise is to the children of Elizabeth as a class. What ever estate, therefore, one child takes, must have been intended for every other child as a member of the same class, upon the principle of the maxim, *quocumque a totis*, which, as was observed by the Court in *Hay v. The Earl of Coventry* (a), was no pedantic or inconsiderate ex-

(a) 5 T. R. 85. 1801, and 2 (c)

provision when filling from Lord *Hay*, but was intended to satisfy in short terms the grounds upon which he formed his judgment. The remaining grandchildren of *Elizabeth*, indisputably taken care of, and the testator has shown no preference to them over their brother *John*; on the contrary, the testator has exhibited an implicit confidence in *John*, and imposed upon him an onerous trust; a trust which, on the supposition of his taking only a life estate, his heir would have to discharge, whilst *John's* share, instead of descending to that heir, would be divided among the objects for whose benefit the trust was to be exercised. In *3 Bulstrode, 271*, a case is put by *Croft J.*, where *Blackacre* is given to an elder son and his heirs for his part or portion, and *Whiteacre* to a younger son for his part or portion, omitting the word "heirs," yet the Court supplied that word. In *Evans v. Ashley (a)*, the fourth son of *Charles Duckensfield, Esq.*, was held to take the same estate as his elder brothers, by analogy to the estates expressly limited to them, though no words of limitation accompanied the devise to the fourth son. And this decision was supported by the authority of the Court in the case of *Hay v. The Earl of Coventry*. (b) In *Spalding v. Spalding (c)*, an estate-tail was implied without express words of limitation, from analogy to estates which were limited to younger sons. The reason for the decision in that case is thus stated by *Hale J.*, in the case of *King v. Melling (d)*, "that the testator could not intend to prefer a younger son before the issue of his eldest." So in *White v. Barber (e)*, the testator made a provision

(a) 5 Burr. 1570.

(b) 5 T. R. 85.

(c) Cro. Car. 185.

(d) 1 Vent. 230.

(e) 5 Burr. 2705.

1800
1801
1802
1803
1804

for his posthumous children only, and which must occupy words, binding such a condition to the estate in his lifetime; and that, if the testator had intended to give the estate to his children for life, he would have said so, and not have said "to his children only." The testator, therefore, intended to give the estate to his children for life, and not to his children only.

RAYLEY J. (b). The question in this case is whether the children of *Elizabeth Frost* took estates for life or in fee. The testator gives certain lands mentioned in the will, to his two daughters, *Elizabeth* and *Ann Mason*, to be equally divided between them at the time of his decease; and at the death of his daughter *Elizabeth*, her share of the land is to be equally divided between her children; and at the time of his daughter *Ann's* decease her share of the land is to be equally divided between her children; and in case she dies without issue, her share is to go to *Elizabeth Frost* for her life, and after her death to her children. The part of the will which I have already read, contains no words sufficient to give an estate of inheritance; it is a general devise, and would give no more than an estate for life. But although the words of the particular clause are not sufficient to pass the whole interest, yet, if there be any thing upon the face of the will to shew that such was the manifest intention of the testator, as if there was a charge

(a) *see Rayley v. Rayley*, 10 Mod. 121.
(b) The judgment of the Court was delivered at the delivery of the term, but some days after the case was argued.

upon the children, or, as it is said, upon the issue they died before a particular period, the Court stand so construe the will as to give effect to that intention. Now I think there is a subsequent clause in the will, from which it manifestly appears that the testator intended to give the son. This will may be divided into two parts, the disposing part, and the qualifying part. The disposing part ends with the residuary clause, and the testator seems to intend to bestow the term "share and share alike," to shew that he had divided his property into shares. Then comes the qualifying part of the will; and he directs the share which he has given to his granddaughter *Ellen*, to be placed in the hands of her father *William Orye*, and the interest to be paid to her for her life, and at her death, the principal to be divided among her children, share and share alike. Now there are no words of gift there; but it is obvious from the frame of that clause, that the testator thought, that in the disposing part of the will, he had used words which would have given an interest to last beyond her life. Having made this qualification as to her share, he then qualifies the devise in question by the following clause: "And it is likewise my will, that such share or shares of such lands as I have bequeathed as above to *Elizabeth Frost* and *Mrs Massey*, and likewise such share or shares of money as may happen to become due by virtue of this my will to my grandson and granddaughter *Robert* and *Hannah Frost*, shall be placed in the hands of their brother *John Frost*, his heirs or assigns, and the rents, issues, and profits of such share or shares of such lands, and likewise interest for such share or shares of money to be paid to them during the term of their natural lives; and after their decease, his or her undivided respective shares to

be

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

1788.

Be equally divided among his or her children lawfully begotten; if such there are, if not, to become the property of his or her heirs, or assigns for ever: that is, he qualifies the disposition to Robert and Hannah Frost by stating, that if they have children, the children are to take their shares; and in the event of their having no children, it is to become the property of them, their heirs and assigns, for ever. This clause is followed by a qualification of the former qualification, enabling John Frost, at his discretion, to deliver up or pay to Robert Frost all or any part of his share, for his advancement in the world. It must be recollected that in this case there is no gift to Robert and Hannah Frost by name, but to them as a class, viz. as the children of Elizabeth Frost; and if we can collect from any part of the will that the testator intended that any of the children were to take a fee, that would be a ground for lawfully concluding that each should have a fee in his share. Now the clause to which I have referred in the qualifying part of the will shows clearly that the testator thought that, in the disposing part, he had used words sufficient to pass a fee; for he declares that the shares given to Robert and Hannah during their lives should be placed in the hands of John Frost, and at their death should go to their children, if they had any, and if they died without issue, to be at their sole disposal; and further, that John Frost might, if he should think proper, let Robert Frost have the whole or any part of his share for his advancement in the world or otherwise. It seems to me that these qualifications show clearly that he intended to give a fee to Robert and Hannah Frost; and it therefore necessarily follows that the other children should also take a fee.

1788.

devoted to them. I am therefore of opinion that, upon the whole, will taken together, the children of *Elizabeth Frost* took an estate in fee in the lands devised to *Elizabeth Frost* and *Ann Massey* for their lives, and that being so, the judgment must be for the defendant.

on said *judgment* for the defendant.
 and *judgment* for the defendant.
 of *BRANDY against PEACOCK*.

THIS was an action for maliciously, and without reasonable and probable cause, arresting and holding the plaintiff to bail, upon a bill of *Middlesex*, returnable in *Michaelmas* term, 1821. The declaration averred that the defendant had voluntarily permitted the suit to be discontinued for want of prosecution, and thereupon the same was accordingly discontinued, and wholly ended and determined. Plea, not guilty. At the trial before *Abbott C.J.* at the *Middlesex* sittings after last *Trinity* term, it appeared that the original action, upon which the arrest took place, was commenced in *Michaelmas* term, 1821. That on the 6th of *February* a rule was taken out by the then plaintiff to discontinue the action on payment of costs. An appointment was afterwards obtained from the Master to tax the costs on the 17th of *February*, but they were not, in fact, taxed and paid till the 11th of *March* following. The writ in the present action was sued out on the 29th of *January*, and the bill of *Middlesex* was alleged on the record to have been filed on *Friday* next after the morning of the publication, being the 8th of *February*. No judgment of discontinuance had been entered up, but it was agreed,

1821.

Das den
 Day
 against
 Peacock

On the 6th of *February*, a rule to discontinue the action, on payment of costs, was obtained by the plaintiff. The costs were not taxed until the 11th of *March*. Held, that when the costs were taxed, and the judgment of discontinuance entered up, it related back to the day when the rule for discontinuance was obtained, and that the action was to be considered discontinued from that time.

180

CASES IN EASTER TERM

REPORT OF THE LORDS OF THE CHANCERY

1823,

1823
BRIDGE
FORD
LONDON

between the parties before the trial, that the question, whether or not the present action had been commenced too soon, should be considered and decided as if a record of the discontinuance of the former action had been produced and given in evidence, properly drawn up in such form, as by law it ought to be drawn, with regard to the date of the rule for discontinuance, and the day of payment of the costs. It was objected at the trial that the action was commenced too soon, inasmuch as the original action was not finally discontinued until the payment of costs on the 6th of *March*. The Lord C. J. reserved the point, and the plaintiff obtained a verdict. A rule nisi for entering a nonsuit having been obtained in last *Michaelmas* term,

Marryat and *Comyn* now shewed cause. This action was not commenced too soon. When the rule to discontinue was once taken out, although the plaintiff might abandon that rule, yet the defendant had a right to consider it as an indication of the plaintiff's intention to give up the action, and the present plaintiff might immediately commence an action for a malicious arrest, before the taxation and payment of costs on the rule of discontinuance. The payment of these costs, when taxed, were necessary to give effect to the rule, and were in the nature of a condition precedent on the party obtaining the rule; if the latter did not pay them, he might be forced on by the defendant in the original action, and have his proceedings nonprossed; but the costs, when taxed, had relation to the time when the rule was obtained, and therefore the judgment of discontinuance was properly stated to be on the day when the rule nisi was obtained. If this had been the ordinary

nary proceeding of following up the rule nisi by obtaining a rule absolute, it would have been different. But this was an anomalous proceeding altogether, and if the judgment were not properly stated to have been on the day of obtaining the rule nisi, or, at least as a judgment of that term, when could it be stated to have been given? The costs were not finally taxed and paid till the 11th of *March*, and judgment could not be given in the vacation. They cited precedents to this effect. *Tidd's Reams*, 269. 1 *Townshend's Book of Judgments*, 68.

1823:
CHARGE
AGAINST
FELICITY.

Gurney and Holt contra. The action was not discontinued until the costs were paid. A rule to discontinue is like a summons to stay proceedings on payment of debt and costs, which does not stay the action till the costs are taxed and paid. If such a rule were not binding upon the plaintiff, (who might abandon his rule to discontinue and proceed,) how could it be said to terminate the action? The words of the rule shewed it to be merely conditional. The Court gives the plaintiff leave to discontinue on payment of costs. This is a condition precedent, and until those costs are paid, the action is pending. Now, if the action be pending in the interval between the rule to discontinue and the payment of the costs, how can it be correct to state on the record that the action was discontinued previously to their being taxed and paid? They cited *Stokes v. Woodeson* (a), *Whitmore v. Williams* (b), *Hand v. Lady Dendy* (c), *Bricher v. Eastman* (d), *Smith v. Smith*. (e)

(a) 7 Term R. 6.

(b) 6 Term R. 765.

(c) 2 Str. 1280.

(d) 1 East, 619.

(e) 2 New R. 473.

1822.

Ex parte
against
Prisoner.

Per Curiam. When the judgment of discontinuance is entered, it relates back to the day when the original rule to discontinue was taken out. The action, therefore, in this case, was not commenced too early.

Rule discharged.

CLAUGHTON, Esq., M. P., *against* LEIGH, a Prisoner.

notarized A
Commissioners
of bankrupts
cannot give a
bankrupt a pro-
tection for an
unlimited pe-
riod of time, in
order to enable
him to make a
full disclosure
of his estate
and effects.

A COMMISSION of bankrupt had issued against the defendant in July, 1822, under which he had been several times examined. On the 4th of February last the commissioners indorsed the summons for his appearance as follows: "At the court of commissioners, February 4th, 1822. Be it remembered, that the within named J. L. came and surrendered himself to us, the major part of the commissioners named and authorised in and by a commission of bankrupt awarded against him, and submitted to be examined from time to time, &c., but not being now prepared to make a full disclosure of his estate and effects, prayed further time for that purpose, which we have granted him accordingly." On the 12th of March, (pending such protection,) the defendant was committed to the K. B., in discharge of his bail in another action, and on the 24th of the same month the plaintiff lodged a detainer against him for a debt of 10,000l.

Abraham had obtained a rule nisi to discharge him out of custody as to that action on filing common bail.

Marriott

Marriott opposed the rule, on the ground that the protection was general, without any limit as to time.

1833.

Curran & Co.
Solicitors
at Law

The Court were clearly of opinion that this protection was had, being for an unlimited period of time.

Rule discharged.

Key against Brown.

THE defendant was arrested on a special *capias*, returnable the last return of *Hilary* term. On the 15th of *February* special bail was put in, and notice thereof given on the 17th. Notice of exception to the bail was served on the 18th, and on the same day a declaration was delivered *de bene esse*, indorsed to plead within the first four days of *Easter* term. On the 16th of *April* special bail was perfected.

A declaration cannot be delivered *de bene esse* on process returnable on the last return of the term.

Chitty having obtained a rule to set aside the declaration for irregularity,

Wilde now shewed cause. The question is, whether a declaration may be delivered *de bene esse* on process returnable the last return. The rule of Court, *Trinity* 22 G. 3d, does not decide that he may not. That only regulates the time of pleading. The existence of such a right may be inferred from *Rollston v. Scott* (a). It is true the books of practice do not agree upon this point. (b) But the Court of Common Pleas, in *Kent v.*

(a) 5 T. R. 372.

(b) *Tidd*, Pr. 465. 6th edit.

CASES IN EASTER TERM

1883
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1900
1901
1902
1903
1904
1905
1906
1907
1908
1909
1910
1911
1912
1913
1914
1915
1916
1917
1918
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025
2026
2027
2028
2029
2030
2031
2032
2033
2034
2035
2036
2037
2038
2039
2040
2041
2042
2043
2044
2045
2046
2047
2048
2049
2050
2051
2052
2053
2054
2055
2056
2057
2058
2059
2060
2061
2062
2063
2064
2065
2066
2067
2068
2069
2070
2071
2072
2073
2074
2075
2076
2077
2078
2079
2080
2081
2082
2083
2084
2085
2086
2087
2088
2089
2090
2091
2092
2093
2094
2095
2096
2097
2098
2099
2100

Nates (a), thought a declaration might be delivered de bene esse on process returnable the last return, and the point was expressly so decided in *Abbey v. Martin*. (b)

Per Curiam. Mr. Tidd's reasoning upon this point is very strong. The practice of declaring de bene esse was founded upon certain rules of Court. Now, under those rules, the right so to declare is limited to process returnable before the last return; and it seems that the privilege was only meant to apply where the plaintiff is entitled to a plea of the term. This rule must, therefore, be made absolute.

Rule absolute.

(b) 1 *Mursh*, 587.

(b) 1 *H. Bl.* 553.

GINDERS *against* MOORE.

A defendant having appeared to the action by one attorney cannot, in the same cause, make any application to the court by another without having obtained an order for changing his attorney.

THE defendant was detained in custody at the suit of *Ginders*, for 1284*l*. A commission of bankruptcy issued against *Moore* on the 17th of *August*, 1822, and his certificate was allowed on the 3d of *April*, 1823. The debt due to *Ginders* was proveable under the commission.

F. Pollock obtained a rule to discharge the defendant out of custody.

The Solicitor-General now shewed cause. This application must fail, as *Moore* appeared and pleaded to the action

action by Messrs. *Williams and Goddard*, as his attorneys, and now applies to the Court by an attorney named *Brewer*, without having obtained a rule to change his attorney.

Per Curiam. The rule must be discharged. If we listened to this application, plaintiffs might be perpetually harassed by different attorneys for the same person.

Rule discharged.

Exparte THOMAS JENKINS.

THOMAS JENKINS being brought up on a writ of habeas corpus, *Taunton* moved to discharge him out of custody, on the ground of insufficiency in the writ de contumace capiendo, by which it appeared that a suit had been instituted against *Thomas Jenkins*, in the character of a trustee, under the will of one *Mary Davis*; and that the payment of the sum of 451*l.* had been decreed against him in the same character. The objection was, that as the Ecclesiastical Court has no jurisdiction over trusts, it was not competent to them therefore to make such a decree, and as the defect appeared on the face of the writ, the defendant was entitled to his discharge. And the Court being of this opinion, the rule was granted.

The Ecclesiastical Court has no jurisdiction over trusts, and therefore, where a party, sued as a trustee, was arrested on a writ de contemptu, on process, this Court discharged him out of custody.

1888

THE ADMIRALTY OF WHITBY, AGAINST
RULE OF COURT
 (1888)

Easter Term, 4 Geo. 4.

about 1850. A. to B. as witness that they were not beggled for the purpose of the bill. The bill was drawn by A. and Co. and was sent as a request to B. and Co. to pay the bill. The bill was not paid, and A. and Co. were forced to sue B. and Co. for the amount of the bill. The bill was for the sum of £100, and A. and Co. were forced to pay the same. The bill was not paid, and A. and Co. were forced to sue B. and Co. for the amount of the bill. The bill was for the sum of £100, and A. and Co. were forced to pay the same.

Upon reading the rule made in this court in *Hilary* term last, touching commissions for taking affidavits in this court, It is ORDERED, That attornies and solicitors, duly enrolled and practising in any of the courts of Great Sessions in *Wales*, or in either of the counties palatine of *Chester*, *Lancaster*, or *Durham*, be comprised within the said rule, in like manner as attornies or solicitors of the courts of *Westminster*.

By the Court.

(a) In pursuance of the rule made in this court in *Hilary* term last, touching commissions for taking affidavits in this court, It is ORDERED, That attornies and solicitors, duly enrolled and practising in any of the courts of Great Sessions in *Wales*, or in either of the counties palatine of *Chester*, *Lancaster*, or *Durham*, be comprised within the said rule, in like manner as attornies or solicitors of the courts of *Westminster*.

amre

NEALE, Administratrix of WHITTLE, against
REID and IRVING. (a)

ASSUMPSIT for money had and received to the use of the intestate. Plea, general issue. At the trial, before Bayley J., at the London sittings after Trinity term, 1820, a verdict was found for the plaintiff, damages 3171*l.*, subject to the opinion of the Court on a case, in substance as follows: On the 22d of January, 1800, Whittle and T. G. Williams, being respectively at the port of Norfolk, in Virginia, Whittle sold to Williams 1771 boxes of sugar, for 27,201*l.*, on the terms that the same should be shipped and consigned thence, on board the ship *Martin*, for Lisbon, and should be paid for by bills of exchange to be drawn by Williams on the defendants, payable to the order of Whittle; and, for his better security, it was agreed that one Davidson should proceed with the sugar as supercargo, on the *A.* sold goods to *B.*, at whose risk they were shipped for Lisbon, to be paid for by bills drawn upon *B.* and *Co.* *C.* went as supercargo and trustee for *A.* and *B.*, and was to retain possession of the goods until the amount of the bills drawn upon *B.* and *Co.* was remitted, and then the bill of lading was to be delivered up to *B.* *B.* directed *R.* and *Co.* to effect an insurance, which was done at his expense, and not in pursuance of any agreement between him and *A.* The ship, with the goods on board, was captured, and the underwriters paid a total loss to *R.* and *Co.*, who gave *B.* credit for the money, part of which they paid over to him, and part to his assignees after he had become bankrupt. *R.* and *Co.* paid part of the bills drawn upon them, and rejected others. In an action brought against them by *A.* for money had and received to his use: Held, that they were not bound to apply the money paid on the policy to the discharge of the bills drawn by *B.* for the goods. The defendants, in answer to an application by plaintiff, stated that they could say nothing about some of the bills in question not then accepted, and that their fate must depend upon the state of Williams' account when they became due: Held, that this was not a conditional acceptance, and did not bind *R.* and *Co.* to apply to the payment of the bills any money that they might receive on account of Williams.

(a) In pursuance of the king's warrant, issued ten days before the end of Easter term, Bayley, Holroyd, and Best Js. sat on the 24th of May, and the following days, until Trinity term, in the room adjoining the court, and this and the several following cases were argued and determined.

terms

1000

NEED
of
REED

terms hereafter expressed to have been indorsed on the bill of lading. The sugar was shipped accordingly, and *Williams* drew three sets of bills of exchange on the defendants, each set for 9067*l.*; which he delivered to *Whittle* in payment for the sugar. The bill of lading expressed that the sugars were shipped for account and risk of *Williams*, to be delivered at *Lisbon* to *Davidson*, supercargo, agreeable to the indorsement on the bill of lading, which was as follows: "The within cargo having been purchased by *Williams*, payable by bills on *Reid* and *Irving*, of *London*, and *Whittle* and *Williams* having appointed *Davidson* their joint trustee, for the purpose of securing the remittance of 27,201*l.* to *Reid* and *Irving* to meet the payment of the bills out of the proceeds of the cargo, it is hereby declared, that on *Davidson* being satisfied for the sum above mentioned, the bill of lading is to be delivered to *Williams*, who is to appoint the port or ports of destination, and the house which is to make sale of the cargo." On the 29th of *January*, 1800, *Williams* wrote to the defendants, requesting them to effect an insurance on the sugars to the amount of 35,000*l.*, which they accordingly did on the 13th of *March*, 1800, at an expence to *Williams* of 7907*l.* The *Martin*, before her arrival at *Lisbon* with the sugars on board, was captured by a *French* privateer. *Williams* abandoned the cargo to the underwriters, who paid to the defendants the sum of 35,000*l.* as a total loss, which was placed to the credit of *Williams*. The cargo was afterwards restored and sold for 18,600*l.*, which was received by the underwriters. On the 30th of *May*, 1800, *Whittle* wrote to the defendants, expressing his hopes, that they would protect all the bills drawn by *Williams*,
and

1800;
 NEARBY
 1800;
 1800;
 1800;

and reminded them that they would have the proceeds of the policy as a security. On the 23d of *July*, 1800, the defendants in answer informed *Whittle*, that they had paid the first set of bills, amounting to 2,067*l.*; and added, "we can say nothing, however, more at present about the other bills, as the fate of them will depend (not being accepted) upon the state of *Williams'* accounts when they become due." On the 23d of *August*, 1800, the defendants wrote again to *Whittle*, and informed him that they had paid the second set of bills, amounting together with those before paid, to 18,134*l.*; they added, "we do not know what will be the fate of the third set, which have not yet appeared for acceptance, but we will do all we can to prevent loss to the parties." The defendants afterwards paid several other of the bills drawn by *Williams*, making together with those before paid, the sum of 23,434*l.*; but they refused to pay the remainder, amounting to 3,767*l.* In 1802 *Williams* became bankrupt, and the defendants had, by payments to him, and on his account before his bankruptcy, discharged all that had ever been received by them on account of *Williams* or his estate. *Whittle* received from the estate of *Williams*, under the commission, the sum of 596*l.*, in respect of the bills for 3,767*l.*

Chitty, for the plaintiff. The question for the Court is, whether the defendants were justified in parting with the money received by them on the policy, without discharging the demand of the plaintiff. The cargo, had it come to their hands, would have been subject to an appropriation to the payment of the bills. Now the contract for insurance, was merely for an indemnity in respect of the cargo on which it was made. It must, therefore,

the drawer, in which action the sheriff was guilty of an escape on mesne process. The assignees then sued him, and recovered the amount of the bill. The cestui que trust brought an action against them for money had and received, and the sole question determined was, that the original debt, in respect of which the action against the sheriff was maintained, should enure to the benefit of the party for whom the bankrupt was trustee, and should not go to the assignees. It is in this case insisted, that the plaintiff, as the representative of *Whittle*, is entitled to consider the defendants as trustees in respect of money had and received under the policy. First, upon the ground of the original transaction; secondly, upon the letter from *Williams* authorising the insurance, and holding it out to the defendants as an inducement to accept his bills; and, thirdly, upon the letters of *July* and *August* 1820, wherein the defendants state that they have paid a part of the bills, and which are supposed to contain expressions binding them to hold the money received from the underwriters to the use of *Whittle*. It appears by the facts of the case, that *Williams* bought sugars of *Whittle* to the amount of 27,000*l.*, and as a security for the latter, it was agreed that *Davidson* should go as supercargo in the vessel on board whereof they were shipped, and should keep possession until the sum of 27,000*l.* was remitted to take up the bills. It is clear, therefore, that *Whittle* had a security upon the goods for the whole price; and the question is, whether the reservation of such a security upon the goods, gave him a security upon the policy also. Now it was no part of the original bargain that *Williams* should insure, but it being left to his option, he thought proper to do so, and paid a large sum of money to cover the risk. It has never
been

1824
1821
Wm. H. H.
H. H.
H. H.

been decided, that a person not bound to insure, but who elects to insure in order to cover payments if the goods do not arrive, may not apply the proceeds of the policy to his own use. The premium for the insurance comes out of the general means of the party effecting it, and diminishes the fund applicable to the claims of general creditors. As between them and the seller of the particular goods, they certainly would be entitled to the money secured by the policy. It is not the produce of the goods, but is a substitute for it, and not liable to the same burthens. The letter ordering the insurance does not vary the case. It does not appear that it was to be communicated to *Whittle*, it was merely a private communication addressed by *Williams* to *Reid* and Co., upon whom he had drawn, pointing out to them the security which they would have if they accepted his bills. There is no intimation in it that any person was concerned with him in the policy, nor did it give the defendants any authority to apply the proceeds of the policy to *Whittle's* benefit. But it is supposed, thirdly, that the letters written by the defendants in *July* and *August 1800*, amounted to an acceptance, or at least would have the effect of appropriating to the payment of the bills whatever monies they might receive on account of *Williams*. The passage relied upon in the letter of *August*, is, "We do not know what will be the fate of the third set of bills, which have not yet appeared for acceptance, but we will do all we can to prevent loss to the parties;" and the former letter carries the case no further. So far from saying that they shall be paid, the defendants say that they have not and will not engage to pay them, but that it must depend upon the state of *Williams's* account; and no such engagement was made,

made, even supposing them to have had in the first instance authority to apply the proceeds of the policy to the payment of those bills, yet *Williams* might have revoked it. The plaintiff, therefore, is not on any one of the grounds taken, entitled to recover in this action, and the postea must be delivered to the defendants.

HOLROYD J. I am of opinion that the plaintiff is not entitled to recover. The question depends, first, upon the nature of the original transaction; and, secondly, upon the correspondence. As to the first point, it appears, that upon the purchase being made by *Williams*, *Whittle* did, not part with his control over the goods; they were placed in the hands of *Davidson*, who was to go as supercargo, and retain the possession until the price was paid, when it was to be given up to *Williams*; nothing, however, but the goods was pledged as a security to *Whittle*. The cargo was shipped at the risk of *Williams*, and if the goods had been lost on the voyage the loss would have fallen upon him. Being under a liability to pay for the goods if lost, *Williams* insured to a large amount at his own expense; he had made no bargain to insure, but whether insured or not was compellable to pay the bills, and, therefore, provided a substitute for the cargo, to indemnify himself in case of a loss. The sum insured was not subject to the same liabilities as the cargo; *Williams* was, therefore, entitled to the money paid by the underwriters, except so far as he, by express agreement, made it liable to the claims of others. He did make it liable to the Defendants, but not to *Whittle*. In consequence of the goods not being parted with, *Davidson* might have insisted on keeping possession of them when abandoned, and by that means, *Whittle* would have

1859.

HEALE
against
Hep.

have obtained the amount produced by the sale after they were restored. But in fact the case states that the defendants paid *Whittle* more than the goods produced. With respect to the correspondence, unless that amounts to an acceptance of the bills, or to an appropriation of the money to the payment of them, it furnishes no ground to maintain this action. So far from being an acceptance, it expressly shows that some of the bills were not accepted, and also that the defendants would not undertake to apply the funds in their hands to the payment of them.

DEAR J. This is a very plain case, whether it be considered in a legal or equitable point of view. The original transaction was a sale of goods, by which the vendor would have parted with all control over them, unless a special agreement to the contrary had been made. It is insisted that the contract was such as to give the vendor a right, not only to the proceeds of the goods, but of the policy also. That contract was contained in an indorsement on the bill of lading, and the only thing charged by it in the hands of the trustee, to the payment of the bills, is the proceeds of the cargo; it does not mention the policy at all. If *Whittle* was not satisfied with that, he should have made an express stipulation that a policy should be effected for his security. In that case the sum insured would have been bound; but there was no such stipulation; the vendor would, therefore, have no more claim to that money than he would have had to the cargo, without an express agreement. The policy was effected by *Williams* at his own expense, and without even the privity of *Whittle*; had the latter, at the time of making the contract, insisted

1925.

101
 102
 103
 104

The Earl of Shaftesbury and Others against Russell.

A testator being seized of the mansion-house of B. for his life, and being the owner of certain household furniture, pictures, &c. therein, bequeathed the latter to trustees upon trust, to permit the same to be held and enjoyed by the person who, for the time being, would be entitled to the possession of his freehold estates; and he further directed, that whilst the said freehold estates should be held

THIS was a special action on the case, by the plaintiffs, as the owners, under trust, of household furniture, pictures, &c. in the mansion-house of *Blenheim*, which were held and enjoyed, with their consent, by the Duke of *Marlborough*, under those trusts, against the defendant, a collector of taxes, for wrongfully distraining those goods for taxes and duties upon windows, and inhabited houses charged upon the mansion-house, and for other taxes upon male servants, carriages, horses, dogs, &c. due from the duke. There was also a count in trover. Plea, not guilty.

At the trial, before *Abbott C. J.*, at the *Middlesex* sittings in *Easter* term, 1822, the jury found a verdict for the plaintiffs, subject to the opinion of the Court on the following case :

and enjoyed by the testator, entitled to his said mansion-house, the said chattels should be kept in the mansion-house, and not removed therefrom, unless with the consent of the trustees. Upon the death of the testator, the goods and chattels were in the said mansion-house, and his son then became seized of the freehold estates, and entitled to the mansion-house for his life, and remained in the occupation of the same, and of the household furniture, &c. mentioned in the will: Held, that even if the son of the testator had been a trader, and become bankrupt, and had had the goods in his possession at the time of the act of bankruptcy, under the above circumstances, they would not have passed to his assignees as property in his order and disposition within the meaning of the 21 Jac. 1. c. 19., and therefore that a collector of taxes was not justified in distraining these goods for taxes due from the son in respect of horses, carriages, dogs, &c. under the 49 G. 3. c. 99. s. 28., by which collectors of taxes are authorized to use all remedies and powers which, by any acts concerning bankrupts are given to creditors. Quere. Whether that section applies to persons not subject to the bankruptcy laws.

By sect. 33. of the 43 G. & c. 99. it is enacted, "that if any question or difference shall arise upon taking any distress, the same shall be determined by the commissioners of the taxes;" Held, that as the jurisdiction of the superior courts was not expressly taken away, an action at common law was maintainable for a wrongful distress.

George,

1803

The Earl of
SHAFTESBURY
against
RUSSELL,

George, late Duke of *Marlborough*, was, in his lifetime and up to the time of his death, owner of the goods and chattels mentioned in the declaration, and was seised of the mansion-house of *Blenheim* for the term of his natural life; and by his will, dated the 31st day of March, 1812, gave and bequeathed the said goods and chattels to the plaintiffs, upon trust to permit the same to be held and enjoyed, so far as the rules of law and equity would permit, by the person who, for the time being, would be entitled to the possession of his freehold estates therein-before devised to the Marquis of *Blandford*, now Duke of *Marlborough*, for his life, with such remainders over as therein mentioned. And the testator directed that, whilst his freehold estates should, under the limitations in his will, belong to and be held and enjoyed by the person or persons entitled by act of parliament to his aforesaid mansion-house, gardens, and pleasure-grounds at *Blenheim*, the chattels should be kept and preserved in the same mansion-house, gardens, and pleasure-grounds, and should not be removed therefrom, unless with the consent of the trustees. And he appointed the trustees executors of his will. The late duke, before the seizure of the goods and chattels mentioned in the declaration, died, and at the time of his death the goods and chattels were in the mansion-house at *Blenheim*. Upon the death of the late duke, the present Duke of *Marlborough* became seised of the mansion-house at *Blenheim* for the term of his natural life, and he has ever since occupied and still continues to occupy it. From the death of the late duke and up to the time of seizing and distraining the goods and chattels, they remained in the mansion-

1822.

The Earl of
Shaftesbury
against
Russell.

house at *Blenheim*, in the name of the present duke. *Robert Russell*, the defendant, was the collector of certain duties granted and assessed by the statute 48 G. 3. c. 99. and other subsequent acts, and the other duties of assessed taxes for the division of *Blenheim*, and had the usual warrants of the commissioners acting under the said acts delivered to him at the time of his appointment. At the time of distraining the goods and chattels mentioned in the declaration, certain taxes and duties were charged, and were due from the present Duke of *Marlborough* to his majesty. The window-taxes and duties, amounting to the sum of 672*l.* 15*s.* 6*d.*, were charged upon and were due from the said present duke in respect of the mansion-house at *Blenheim*; the rest of the taxes and duties were assessed upon the several articles before mentioned, returned by the present duke to be paid for at *Blenheim* aforesaid. Before any distress was made for the said arrears of taxes and duties, the defendant made a demand of the same, as they became due from the present duke, and required him to pay them; but he did not do so. On the 10th May, 1821, the goods and chattels of the plaintiffs, mentioned in the declaration, were distrained by the defendant for the said several and respective taxes and duties payable to his majesty, so assessed and charged upon the present duke. The plaintiff, after the seizing of the goods and chattels, tendered and offered the defendant to pay him the sum of 672*l.* 15*s.* 6*d.*, the amount of the house and window taxes and duties, and also the sum of 50*l.*, the same being a competent sum for the expences of keeping and selling such part of the goods and chattels as were proper and necessary to be sold for the payment of the said

said house and window taxes and duties, and demanded and required of the defendant to deliver to the plaintiff the goods and chattels so seized and taken; but the defendant refused to deliver them.

1838.

The Earl of
Shaftesbury
against
Russell.

Rogers; for the plaintiffs. The assessments are made under the 43 G. 3. c. 161., and the mode of the recovery of arrears due upon them is prescribed by 43 G. 3. c. 99. The act of the 43 G. 3. c. 161. is divided into two classes, the first of which has reference to the assessments A and B, which are the assessments on windows and houses; the second refers to assessments C, D, E, F, G, H, I, J, K, the assessments for the other taxes. In the first class the charge is made upon the premises, in the second on the person. The 43 G. 3. c. 99. s. 83. provides a separate remedy for the recovery of arrears due upon each class of assessment, viz. to distrain upon the messuages, lands, and tenements charged, and to distrain the person charged by his or their goods and chattels, and all such other goods and chattels as they are thereby authorized to distrain, without further warrant from the commissioners. The latter words do not give any new or original power, much less are they intended to extend either of the powers previously given; but they apply to particular cases expressly provided for, and mean only that, in such cases the collector may proceed without any further authority. One of these cases is contained in 43 G. 3. c. 99. s. 37.; and another is mentioned in the 43 G. 3. c. 161. s. 55. It is clear from both these statutes, that the two classes of assessments were intended to be kept distinct, and that the two remedies were to be specifically applied. But these goods were not liable under either class of assessment; they were

1829.
The Earl of
Stafford
v.
Barnard

neither goods on the premises charged, nor of the person charged, nor did they fall within the particular cases to which the words, "such other goods as the collector is hereby authorized to distrain," apply. As to the property in the goods, the Duke of M. has none of which a court of law can take cognizance. The words in the will, "as far as the rules of law or equity will permit," shew that the duke was not to have even the use of them in a manner inconsistent with the absolute devise to the trustees; nor is there a pretence for saying that the apparent possession was tainted with fraud; for it was a possession in execution of the trust, which Lord Mansfield, in *Cadogan v. Kennet* (a), considers as a circumstance which conclusively negatives fraud.

Parke contra. It is perfectly clear that for arrears of taxes on houses and windows the collector has a right to distrain any goods of a third person found on the premises charged. *Jason v. Dixon*: (b). With respect to the mode of recovering those taxes which are charged upon the person, it is material to advert to the 36th section of the 43 G. 3. c. 99. By that section, all remedies, advantages, powers, &c. which, by any laws concerning bankrupts, or concerning the method of recovering rent in arrear, are given or granted to any creditors, lessors, or landlords respectively, shall be used and practised by such respective commissioners, and by any collector acting under their authority, for the recovering and securing any arrears of such duties over and above the powers and remedies contained in that act. Now the assignees of a bankrupt would

(a) *Comp.* 152.

(b) *M.* 615. 594.

be entitled to recover these goods as goods in the order, and disposition of the bankrupt, with the consent of the true owner. Besides, an action at common law is not maintainable, even if the taking were wrongful: for section 33 enacts, "that if any question or difference shall arise upon taking such distress, the same shall be determined and ended by two or more of such commissioners." The subject-matter of this action was a question or difference arising upon taking the distress, and therefore ought to have been determined by the commissioners.

1828:

The Earl of
Surrender
against
Russell

BAYLEY, J. I am of opinion that the plaintiffs are entitled to recover. The distress in this case is for taxes, which the act of parliament charges, not upon the premises, but upon the person of the individual. The question therefore is, whether the law has given the remedy by distress in such a case. Now by the 43 G. 3. c. 59. s. 33, the collectors are authorized to distrain upon the messuages, lands, tenements, and premises charged with any sum of money, or to distrain the person so charged by his goods and chattels, and all such other goods and chattels as they are thereby authorized to distrain. There are, therefore, three classes of cases in which the distress is lawful; first, it is lawful to distrain goods on the premises charged; secondly, goods of the person charged; and, thirdly, goods authorized to be distrained by the particular provisions of the act. Now it lies upon the party making the distress to show that it is lawful. No particular provision of the act has been pointed out to us by the defendant's counsel by which any goods, except those of the person charged, are liable to be distrained in respect of taxes

1823.

The Earl of
Barrington
vs.
Barrington.

charged upon the person of the individual, and; therefore, we must take it that there is no express provision authorizing the collector in such a case to seize any goods not the property of the person charged. That being so, the question is, were these the goods of the person charged? The person charged in this case was the Duke of *Marlborough*; but the goods seized were, in point of law, the property of the trustees. The Duke of *M.* had the use of them in a particular mode, but they were not to be taken off the premises; he had the custody of them under a trust, but nothing more. It is clear, therefore, that these were not the goods of the person charged. It has been argued, however, that if the Duke had been a trader, and had become bankrupt, and the goods had been in his possession, under the circumstances mentioned in the case, at the time of the bankruptcy, that they would have passed to his assignees as property in his order and disposition, with the consent of the true owner, within the 21 *Jas.* c. 19. s. 11., and therefore that the collector was entitled to seize them under the 43 G. 3. c. 99. s. 38., by which "all remedies, which by any act or acts concerning bankrupts were given to any creditors, are granted to the commissioners and the collectors therein mentioned." Now, without deciding whether that clause would apply to a person in the situation of the Duke of *Marlborough*, who is not a trader, and therefore not subject to the bankrupt laws, (which may be doubtful,) it appears perfectly clear, upon the authority of decided cases, that if he had been a trader and a bankrupt, and had had the goods in his possession at the time of his bankruptcy, under the circumstances stated in this case, they would not be considered as in his order and disposition with the

the consent of the true owner, within the meaning of the 21 Jac. 1. c. 19. In *Jarman v. Woodston* (a), a woman before marriage, with the consent of her intended husband, conveyed all her stock in trade and furniture to trustees, to enable her to carry on her business separately: it was held, the husband not having meddled with them, and there being no fraud, that such effects (though fluctuating) were not liable to his debts upon his becoming bankrupt; and that case was decided on the ground, that the husband had not the order and disposition of the property with the consent of the real owner, for the trustee was the legal owner, and he gave no consent for such purpose. In *Darby v. Smith* (b), the assignees were held entitled to recover, on the ground that the trustees had assented to the husband's having the apparent order and disposition. It is a material circumstance in this case, that the goods never had belonged to the present Duke of Marlborough. They had belonged to the former Duke, and any person who wished to trace the ownership by referring to the proper depository of his will, would have learned that the present Duke had only a limited use of the goods, and that he had no more controul over them than a lodger in a ready furnished house has over the furniture. The trustees were the real owners, but they did not permit him to have the order and disposition of the goods. The only power he had over them, was derived not from them, but from the will of the late Duke. As to the other objection, that this action is not maintainable, and that the matter was determinable by the commissioners only, I am of opinion, that inasmuch as

NOTE!

The Earl of
Shaftesbury
against
Barnard.

(a) 3 T. R. 648.

(b) 3 T. R. 82.

1827

The Earl of
Sharncliffe
vs.
Baker

the right to resort to the superior courts of law can only be taken away by express words, and as there are none such in this act of parliament, this action is properly brought. For these reasons the judgment must be for the plaintiff.

HOLROYD and BEST Justices concurred.

Judgment for the plaintiff.

- Hatch
- Watson
- Walker

PRIDY and Another against HENDREY.

Debt by the
drawer against
the acceptor of
a bill of ex-
change, payable
to the drawer
or his order,
for value re-
ceived in goods.
Held, that the
action would
lie.

DECLARATION in debt by the plaintiff, and that the defendant is drawer of a bill of exchange for 500*l*. (payable two months after date) to the plaintiff, or their order, of full value received in goods against the defendant as the acceptor. Demurred. The question was, whether this action of debt was maintainable. The case was argued in the course of the last term by Crowder in support of the demurrer, and Chitty contra. The arguments and several authorities cited are so fully commented on in the judgment of the Court, that it becomes unnecessary to state them here.

Cur. adv. vult.

The judgment of the Court was now delivered by

BAYLEY J. This was an action of debt by the drawer of a bill of exchange against the acceptor, and the question was whether, circumstanced as this case was, the action of debt could be maintained. Whether debt will lie in all cases by the drawer against the acceptor is not the question, but whether it will lie under the particular circumstances of this case. The bill

bill is payable to the plaintiff the drawer, or their order, and it imports to be for value received in goods. The words "value received," in a bill like this, must, according to *Payne v. Parness* (a), be understood to mean value received by the acceptor from the drawer. This acceptance, therefore, is an admission by the defendant, not that he may hereafter receive value, but that he previously has received value in goods, and upon such an acceptance, my Brother *Hobroyd* and myself, (the only Judges before whom the case was argued,) are of opinion, that the action of debt may be maintained. The case was extremely well argued for the defendant by Mr. *Cromarty*, and he referred us to the authorities in which it has been held, that debt will not lie against the acceptor of a bill; but in none of these cases does the action appear to have been brought by the drawer upon a bill payable to his own order, importing to be for value previously received: the reason for those decisions is inapplicable to an action by the drawer upon a bill so framed; and there are several determinations, some upon promissory notes, and one upon a bill, which fully justify a contrary inference. In *Hard. 485.*, the leading case upon this point, the action was by the payee against the acceptor upon a bill drawn by a third person: the objection was, that there was no privity between the plaintiff and the defendant; and *Hale C. B.* observed upon the argument, that the great question was, whether a debt or duty were raised by the acceptance, for if it were no more than a collateral engagement, debt lay not; and when the Court on a subsequent day delivered their opinions, the ground of their

1825.
Printed
against
Hobroyd

sent by all
the judges
to the House
of Commons
to be read
and then
to be
discussed
and then
to be
voted on

1823,

PAIDY
against
HENRY.

was, that the acceptance did not create a duty, any more than a promise, in consideration of forbearance, made by a stranger, and that he that drew the bill continues the debtor. Now, between the parties in this case, privity does exist. This is not a collateral engagement, as an engagement for the debt of a third person, but an engagement for the proper debt of the defendant, and he, and he only was at the time of the acceptance, and still continues debtor. The decision, therefore, in that case, concludes nothing against the plaintiff in this, and the grounds of the decision rather make for the plaintiff than against him. *Brown v. London (a)* was indebitatus assumpsit by payee against the acceptor on a bill drawn by a third person; it was, therefore, in all its circumstances, like the case in *Harcher*, which it calls *Milton's case*. *Trotter* and *Marston* at first thought the action maintainable, because being after verdict, they said it should be intended defendant had effects and value in his hands. It was four times before the Court: it was decided within three years after the former case, by *Holt C. J.* and *Rainsford J.*, two of the Judges who joined in the former decision, upon which it was entirely founded. *Hodges v. Steward (b)* was not an action of debt or indebitatus assumpsit, but a special action of assumpsit; but the bill being payable to *J. S. or bearer*, and not to *J. S. or order*, the question was, whether any action could be maintained upon it by an indorsee. That case, therefore, was not cited in the argument for the sake of the decision, but on account of dicta which it contained: "*Skinn.* 832; per *Holt C. J.* Indebitatus

(a) 1 Mod. 285. 2 Keb. 695. 713. 758. 822. (b) *Skinn.* 522. 346.

assumpsit will not lie on a bill of exchange, and he cited *London's case* to the purpose." *Skinner*, 846. "In this case it was often times said, that indebitatus assumpsit would not lie upon a bill of exchange, as it had been ruled in divers cases, but against a drawer for value received, there it would lie, but there it is for the apparent consideration." The first of these dicta, therefore, carries the case no farther than *Brown v. London*, to which it refers, and the latter is rather in favour of the plaintiff, because it imports, that where a bill bears upon the face of it that it is for value received, indebitatus assumpsit may lie upon it against the drawer. *Gilbert, Debt*, 864, is evidently founded upon *Milton's case*, and *Brown v. London*, and applies to the case where the payee, who brings the action, is a different person from the drawer, for it uses the expression, that the drawer still continues liable. In *Webb v. Geddes (a)*, the drawer and payee were probably the same persons, but the only question was, whether bail in error was requisite, and although *Lawrence J.* puts this question, what count is there in this declaration, upon which, properly speaking, debt will lie? (and yet there were counts for goods sold, money paid, lent and received, and on an account stated,) and then refers to *Milton's case*, and says, that *Lord Eldon* recognized the same doctrine, (probably referring to *Bishop v. Young (b)*), yet *Chambre J.* who was a very able pleader, and no friend to innovation, was entirely silent upon the point, and only regretted that they were bound to conform to a rule which dispensed with bail in error. Had that judgment been reversed, no doubt it would have been reported, and *Mr. Crumder's* industry would have discovered it. These are the au-

1806.

 PAYEE
 against
 DRAWER.

(a) 1 Taunt. 540.

(b) 2 Bos. & Pull. 78.

.1323.

—
v. *Reuter*
v. *Reuter*
v. *Reuter*

the action is based upon the argument of the defendant, and no one of them fairly warrants the inference that upon a bill payable to the drawer or his order, and imparting to be for value received by the drawer, debt will not lie against the acceptor. Let us now look to the other side, and see what authorities there are to support the action. In *Barnett v. Bell*, 40 Mod. 88, debt was brought upon a promissory note. In 1 Mod. 812, pl. 13, it is said, debt will lie against the maker of a note, not against the indorser. And the question was very fully considered in the case already mentioned of *Bishop v. Young*. That was an action of debt by the payee of a note against the maker. The note imported to be for value received in goods. The Court took time to consider, and from the elaborate judgment of Lord Eldon, it is obvious that much attention was given to the case. His Lordship, after observing that the consideration appeared upon the face of the note (which was for value received in goods) and that it was an action by the payee against the maker, referred to the case of *Welch v. Craig* (a), there relied upon, and intimated, that, according to the reports of that case in 8 Mod. 373, they should apply that case generally, were they to hold it as clear law, that, with out any exception, an indebitatus assumpsit would not lie on a foreign bill, an inland bill, or a promissory note. In the argument in that report he noticed, that the reason given why a general indebitatus assumpsit will not lie, is, for want of consideration. It is observable, he says, on the two reports of *Welch v. Craig*, in *Strange* and 8 Mod., that the reason for holding that debt would not lie on the note was founded on the analogy

(a) See 680, S. C.

of

of notes to bills. It therefore, he says, is true that debt will lie by the payee of a bill against the drawer; it will remain to be considered, whether the analogy will not require us to hold, that in the case of a note having an apparent consideration, debt will not lie by the payee against the maker. The case in *Hindes*, he says, seems to open the principles on which this case (the case in question) must be decided; and, after noticing the position in *Com. Dig. tit. Debt B*, that debt will lie upon every express contract to pay a sum certain; and after giving the reasons why it was decided in *Milton's* case, that debt would not *there* lie against the acceptor of a bill, the reasoning, he says, there is this, that the acceptor's situation is analogous to that of a man who takes upon himself an obligation to pay that which is not his own debt but the debt of another, and looking at the effect of a bill of exchange, it is very reasonable to hold, that though the acceptor be primarily liable, he is liable not for his own debt, but for the debt of another. The drawer owes the debt: Lord *Eldon* then refers to *Hurd's* case, *Salkeld*, 23., where it is said, that *indebitatus assumpsit* will not lie against an acceptor, because *his* is but a collateral engagement, but that it will lie against the drawer, because he is really the debtor, and to *Skinner*, 346., where it is held that debt will lie against the drawer of a bill, importing to be for value received, because of the apparent consideration; and after noticing *Rumball v. Ball*, he says, "Indeed if debt will lie against the drawer, at the suit of the payee, it seems the necessary effect of the statute, which puts notes on the same footing with bills, that debt will lie by the payee of a note against the maker." He concludes, therefore, that in that particular case debt might be maintained, but guards against an inference to cases where

1823.

Parry
against
Haward.

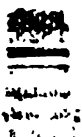
1828
 1829
 1830
 1831
 1832
 1833
 1834
 1835
 1836
 1837
 1838
 1839
 1840
 1841
 1842
 1843
 1844
 1845
 1846
 1847
 1848
 1849
 1850
 1851
 1852
 1853
 1854
 1855
 1856
 1857
 1858
 1859
 1860
 1861
 1862
 1863
 1864
 1865
 1866
 1867
 1868
 1869
 1870
 1871
 1872
 1873
 1874
 1875
 1876
 1877
 1878
 1879
 1880
 1881
 1882
 1883
 1884
 1885
 1886
 1887
 1888
 1889
 1890
 1891
 1892
 1893
 1894
 1895
 1896
 1897
 1898
 1899
 1900

where the action was not by payee against maker, or where the note did not express a consideration upon the face of it. Now what is the principle upon which that case was decided? Evidently this, that where there is a privity (independently of any security) between the parties, and the debtor undertakes not for another's debt but for his own, not to a stranger, but to the creditor, and he enters into a contract to pay that debt, specifying therein that he enters into it for that debt, an action of debt lies. Now look to the analogy between a note, as between maker and payee, and a bill as between drawer and acceptor, and apply the principles of that decision to the case in question. The only difference between the two cases is this, that in the one the party appears to act of his own accord, in the other he acts upon request. The maker of a note promises to pay without (as far as is to be collected from the import of the note) being required so to do, whereas the acceptor of a bill promises because he is requested; but the promise in each case is in substance the same. Apply then the principles of *Bishop v. Young* to this case. There is a privity between the plaintiff and defendant, independently of the bill; the defendant engages not for the debt of a third person, but his own. He engages not to a stranger, but to the party to whom he previously owes that debt, and it is specified in his engagement, that it is for that debt that the engagement is made. This case, therefore, the very case to which in *Webb v. Geddes* Mr. J. Lawrence probably refers is substantially in point in favour of the plaintiff. *Rudder v. Price*, 1 H. Bl. 547., and *Barry v. Robinson*, 1 New Rep. 293., in which the objection, if tenable, would have occurred, tend to shew that the general opinion has been agreeable to that decision;

decision; and the case of *Stanton v. Hill* (a) confirms that doctrine, and extends it to a bill of exchange. That was an action of debt by the indorsee of a bill of exchange, against the person who had indorsed it to him, and who was also drawer and payee. A rule nisi was obtained to arrest the judgment, on the ground, that debt would not lie. But on cause shewn, the Court held that it would, and the rule was discharged. Now the only ground upon which that decision could properly have proceeded was this, that between the immediate indorser and his indorsee there was privity. The indorsement implied that the indorser was debtor pro tanto to the indorsee, and that the indorsement was a contract by the indorser that that debt should be duly paid. Now the argument from that case to this is an argument a fortiori. That was clearly a less favourable case than the present. Here there is an immediate privity between the plaintiff and defendant independently of the bill. The defendant is immediate debtor to the plaintiff, and he contracts, by his acceptance, to pay that debt. Under these circumstances, we think the action of debt maintainable. Had there been want of immediate privity between the parties, or had the bill omitted to specify the consideration, the case might have been different; as it is, we think the action maintainable.

Judgment for the plaintiff.

(a) 3 Price, 245.



**COLLINS and Others against PRUSSER and Others,
Executors of G. S. Wegg, deceased.**

Debt on a bond, whereby Sir N. C., and J. W. acknowledged themselves held and bound to the plaintiffs in "1000*l.* each, for which they bound themselves, and each of them for himself for the whole and entire sum of 1000*l.* each," subject to a condition that G. B. M. should render a true account of all monies received by him as treasurer for the county of *Middlesex*: Held, that this was a several bond only, and that the obligees, by removing the seal of one obligor, did not render it void as to the others.

DEBT on bond, given by *Wegg* to the plaintiffs for 1000*l.* The first plea set out the bond on oyer, which was in the following form: "I *George B. Mainwaring* am held and firmly bound to, &c. (the plaintiffs) in the sum of 12,000*l.*, for which I bind myself, &c.; and I *J. E. W.* am held and firmly bound in the sum of 2000*l.*, for which I bind myself, &c.; and we, *P. P.*, *S. J.*, and *W. E.*, are also held and firmly bound in 2000*l.* each, for which we bind ourselves and each of us for himself, for the whole and entire sum of 2000*l.* each; and we, Sir N. C., G. S. *Wegg* (the testator,) and *J. W.*, are also held and firmly bound in 1000*l.* each, for which we bind ourselves and each of us for himself, for the whole and entire sum of 1000*l.* each." That plea then set out the condition of the bond, whereby (after reciting that *G. B. Mainwaring* had been appointed by the plaintiffs (the justices assembled at the quarter sessions) receiver for the county of *Middlesex*, and it being thought proper by the Court that an adequate security should be given to the county, to the amount of 12,000*l.*; that the obligors in that bond had agreed to become surety for the several sums set to their names respectively (a), and not further or otherwise,) the condition was stated to be, that *G. B. M.* should duly account for

(a) The sum of 2000*l.* was set opposite the name of *P. P.*, but no sums were set opposite the other names.

1823.

Consent
against
Payment.

all monies which were then or should thereafter be in his hands as treasurer; and concluded, that the bond was not the deed of *Wegg*. Second plea, that Sir *N. C.* sealed and delivered the bond, and afterwards his seal was taken from the bond, without the privity or consent of *Wegg* or the defendants. Third plea, that the seal of Sir *N. C.* was taken from the bond with the privity and consent of the plaintiffs. Replication, that before the seal of Sir *N. C.* was taken from the bond, one *F. C.* agreed to become surety in his place, and executed a bond to the plaintiffs for 1000*l.*, conditioned as the one declared on, and thereupon the seal of Sir *N. C.* was taken from the bond, and that *F. C.* had since paid the 1000*l.* Demurrer and joinder.

Littledale, in support of the demurrer. The question is, whether the taking away of Sir *N. C.*'s seal had the effect of rendering the bond void as to *Wegg*. This was a joint and several bond, as to Sir *N. C.* *Wegg* and *J. W.* After the penal sum are these words; "for which payment we bind *ourselves* and each of us." They clearly shew the obligation to be joint to the extent of 1000*l.*, and any one being sued might have contribution from the others. It is not necessary to contend, that, because the obligees might sue each separately for 1000*l.*, they might sue the three jointly for 3000*l.*; but, assuming the deficiency in *G. B. M.*'s accounts to be less than 1000*l.*, they might sue jointly for that. The subject matter of the security was the entire conduct of *G. B. M.*; if each had been bound for a different part of his accounts, the bond might have been several; but the interest being joint, the case is distinguishable from

1881
 1881
 1881
 1881
 1881

Mills v. Marshall (a), and resembles *Slingsby's case* (b), upon the principle of which *Anderson v. Martindale* (c) and *Southcott v. Hoare* (d) were decided. It would certainly be more beneficial to the obligees, to consider this as a joint than as a several bond, for it would save the expense of bringing several actions, and would give them the benefit of a joint execution. Now, as all grants are to be construed most strongly against the grantor, this bond should be so construed as to be most beneficial to the obligees. Then, assuming it to be a joint and several bond, taking off the seal of one obligor avoids it as to all, *Seaton v. Henson* (e), *Nichols v. Haywood* (f), *Michael v. Stockworth* (g), 2 *Roll Abr. Release* (G.) pl. 5. If it be considered a several bond, still the defendants are discharged. Each obligor would have an interest in knowing who were his co-sureties, with a view to contribution, which he would be entitled to, although the bond were several. *Deering v. Winchelsea*. (h) There, too, the parties were bound by several bonds, therefore, *a fortiori*, there must be contribution where all are parties to the same bond. The pleas then are good, and the replication gives no sufficient answer to them, it does not even allege that the new surety was substituted with the privity of the testator.

Rogers, contra. This bond was several as to each party executing it. There is a material distinction between joint and several bonds and the present. In the former the obligation is joint, although the remedy is

(a) *Bridg.* 63.

(c) 1 *East*, 497.

(e) 2 *Lev.* 220. 2 *Show.* 28. S. C.

(g) *On.* 8. Cro. *Eliz.* 120. S. C.

(b) 5 Co. 19.

(d) 3 *Trent.* 87.

(f) *Dyer*, 59 a.

(h) 2 B. & P. 270.

joint

1823.
MILLER
COLLIER
BANK
PUBLISHED

joint or several, but where the duty is several, the bond is several. *Mills v. Marshall* (a), *Hemgate's case* (b), *Anon.* (c), *Shep. Touch.* (d) As to some of the obligors, this bond is unquestionably several, and the mere words of plurality, "we bind ourselves," will not make it joint as to the others. In *Mathewson's case* (e) there were similar words of plurality, but the covenants were held several. That case is expressly in point, and has frequently been recognised as good law. *Constable v. Cleobury* (f), *Bayley v. Gaisford* (g), 2 Roll. Abr. *Fait. y.* pl. 1. The recital too shews that the parties intended this to be a several bond, and that may explain and control the condition. *Pearsall v. Summersett* (h), *Company of Proprietors of Liverpool Water Works v. Atkinson* (i), *Hassell v. Long* (k), *Payler v. Homersham.* (l) It has been argued, that, by removing Sir N. C.'s seal, the defendants' right to contribution has been prejudiced; but in fact it has rather been benefited; for F. C., the new surety, has paid 1000*l.*, which would reduce the demand against the defendant, and Sir N. C. would still be liable to contribution in equity. *Skip v. Hay* (m), *Ex parte Gifford* (n); and it is very doubtful whether an action at law for contribution could have been maintained, even if no alteration had been made in the bond. *Cowell v. Edwards.* (o)

(a) *Bridg.* 63.

(c) *Dyer*, 19 b.

(e) 5 Co. 23.

(g) *March*, 125.

(i) 6 *East*, 506.

(l) 4 M. & S. 23.

(n) 6 *Ves.* 805.

(b) 5 Co. 103 b.

(d) 166.

(f) *Poph.* 161.

(h) 4 *Taunt.* 593.

(k) 2 M. & S. 363.

(m) 3 *Atk.* 91.

(o) 2 B. & R. 268.

.8281

1893.

1893.

1893.

1893.

1893.

Littledale, in reply. Although Sir N. C. may still be liable in equity, yet the defendant would, by the alteration, be compelled to resort to that court, and might have much difficulty in shewing that the seal of Sir N. C. had ever been affixed to the bond. Besides, the obligees could not sue him, and would, therefore, in the first instance, be compelled to throw the whole burden upon the other obligors. As these difficulties have arisen out of the act of the obligees, they ought to suffer instead of the defendant, who is an innocent party.

BAYLEY J. Where parties enter into a joint and several bond, for payment of an entire sum of money, whatever discharges one of the obligors, may discharge them all. But I am satisfied that this was a several, and not a joint and several bond. It would work great injustice to allow the obligees the option of treating it as a joint and several bond. The recital in the condition shews, that each of the parties intended to enter into a security as to a specific limited sum; setting the sum opposite to one of the names, is decisive as to that. But, looking at the obligatory part of the deed, one party is bound in 5000*l.*, three in 2000*l.* each, not in one entire sum; then the three, Sir N. C., *Wegg*, and *J. W.*, in 1000*l.* each. That, as to the 1000*l.* parties, is either a several bond, or, to a certain extent, joint. If the former, it binds each one to the payment of 1000*l.*; but, if joint, then you might sue them all three times over for 1000*l.*; and if only one were solvent, he would be compelled to pay 3000*l.*; whereas it is quite manifest that neither of them intended to be bound beyond 1000*l.* I am, therefore, satisfied that the effect of the

the word "each" was to make this a several, and not a joint and several bond. Then, does the removal of the seal alone destroy the bond as to all? That is the argument for the defendant. If it be right, then, in the case of a bond whereby different parties are severally bound in different sums, from 5000*l.* to 20*l.*, cancelling the bond as to the latter would avoid the bond as to all. If there were any authority for the position, I might feel myself bound by it; but, in the absence of that, we must proceed upon principle. It is said that the right of contribution against Sir N. C. is taken away. If that were so, still, is there any reason for saying that the defendants shall be exonerated from the whole, because they have lost part of their right to contribution? But if the defendant ever would have had a right to contribution from Sir N. C., that right may still be enforced in equity. For these reasons I am of opinion, that the facts disclosed in the pleas afford no answer at law to this action, and that the plaintiffs are entitled to recover.

HOLROD J. This is not a joint and several bond. The word "each," following the penalty, would, by itself, make it a several bond; and the question is, whether that which follows, viz. "for which we bind ourselves and each of us for himself, for the whole and entire sum of 1000*l.* each," makes it joint. On the contrary, those words are merely accumulative, and make it more clearly several. The next question is, whether cancelling the bond as to one destroys it altogether. It has been argued that it does, because the obligors are in a worse situation in law than they otherwise would have been. If the parties had been severally bound in one penalty only, there would be force in the

1833.

—
 Colman
 against
 Freeman.

argument. But this is not a bond for the payment of the same sum; each is bound in a different penalty, although to the same amount; and it does not make any one responsible for the penalty of the other. But it is said that the parties have a right to contribution at law. If, indeed, they had all been bound severally in the same penalty, then any one paying would pay that which another was liable to pay, and so benefit him. That would give a remedy at law for contribution. But the remedy at law is founded upon the principle that one pays that to which all are liable, and it goes no further. If, therefore, one obligor be insolvent, contribution for his share cannot be recovered against the others; it is the subject-matter of a proceeding in equity and not at law. *Cornell v. Edwards*. Suppose a judgment in this action be for 1000*l.*, and the defendants claim for contribution against any other obligor, they will not have paid any penalty to which another was liable, and, therefore, can have no contribution at law. It is true that *G. B. M.*'s conduct, the subject-matter of the security, was joint; but still the penalties were, at law, the several debt of each. A court of equity might give relief, but none can be had at law. The defendants are not, then, placed in a worse situation by the removal of *Sir N. C.*'s seal, and, consequently, cannot set up that as a defence to the present action.

BEST J. Two points have been urged for the defendants in this case. First, that the bond is joint and several; and, secondly, that whether it be so or not, still the defendants are discharged by the removal of *Sir N. C.*'s seal. If the bond be several, *Mathewson's* case is decisive of the last point. No case has been referred

ferred to which at all shakes the doctrine there laid down. Contribution by action at law is a modern proceeding, and the introduction of that cannot alter the common law, as to the effect of taking off the seal of one co-obligor in a several bond. But it is very questionable whether under any circumstances contribution at law could have been had on this bond. The doubt expressed by Lord Eldon in *Condit. Edwards* is entitled to great weight. The right to contribution in equity still subsists. If, indeed, the bond were joint and several, the removal of the seal might have avoided it altogether, but in fact it began as a several bond, and continues so throughout. If it be construed redde de singulis singulis, no doubt can be entertained on that point. I therefore agree in thinking, that the plaintiffs are entitled to judgment.

1823.

—
 Charles
 Knight
 Barrister

Judgment for the plaintiffs.

Handwritten: Hants. v. Bunter & Bury, 22/7

JAMES BUNTER against ELIZABETH TYNDALE
 WARRE.

DECLARATION in replevin for taking the growing corn of the plaintiff. Avowry, that plaintiff and one *Thomas Bunter* held the farms and places in which,

Declaration in replevin for taking the growing corn of the plaintiff. Avowry, that

plaintiff and one *J. B.* held the locus in quo, as tenants to the defendant, at a money rent, and because it was in arrear, defendant took the corn as a distress. Plea in bar, denying the tenancy modo et forma, and issue joined thereon. At the trial, some evidence was given by the defendant, that the plaintiff and *J. B.* were in possession of the premises in question; that a lease had been executed to them by the defendant's ancestor, which plaintiff and *J. B.* had paid for, but which they had refused to execute. It was not proved that *J. B.* was so connected with the plaintiff as to the premises in question as to be jointly liable for the rent; nor was it shown that the corn was the joint property of the plaintiff and *J. B.* The plaintiffs gave evidence to shew that the holding was under an agreement for a term years, and the support of that evidence tendered *J. B.* as witness. He was rejected without being examined on the voir dire as to his liability to the rent or not: Held, that he was not an incompetent witness until that fact was established; and, therefore, that he was improperly rejected.

&c.

1828.

Reverend
against
Warre.

&c. as tenants to the defendant, at a yearly rent of 600*l.* payable quarterly on, &c. and because the rent was in arrear, defendant took the corn as a distress. Plea in bar, denying the tenancy *modo et formâ*, and issue joined thereon. At the trial before *Hullock B.*, at the last assizes for the county of *Somerset*, the defendant gave in evidence a lease of the premises in question, bearing date the 29th September, 1818, from Mr. *Warre* to *James* and *Thomas Bunter* for seven years, by which a rent of 600*l.* payable quarterly was reserved. This lease was executed by *Warre*, but not by the plaintiff or *Thomas Bunter*. It was admitted that *Warre* was, at the time of the granting of the lease, seized in fee of the premises in question; and that, upon his death, on the 21st May, 1819, they descended to Miss *Warre* the defendant. It was proved that *Thomas Bunter* had paid rent in respect of the premises in question, and that the lease had been delivered to him, and some evidence was given to shew that *Thomas* and *James Bunter* were in possession at the time of the lease, and had continued in possession from that time. The *Bunters* paid for the lease, and an account in the handwriting of *James Bunter* was put in, by which he admitted half a year's rent to be due at the rate mentioned in the lease. Upon the close of the defendant's case, the plaintiff's counsel conceiving that *Thomas Bunter* was a party upon the record, applied to the judge to have a verdict entered for him, for the purpose of making him a witness for the plaintiff, *James Bunter*. The learned Judge was of opinion, that there was evidence to go to the jury to shew that *Thomas Bunter* and *James Bunter* were joint tenants, and refused the application. This application was made and refused under a mistaken notion, that *Thomas Bunter* was a party

party to the record. The learned Judge in his report stated, that he did not recollect whether *Thomas Bunter* was offered as a witness in the further proceedings in the cause, but that he had certainly mentioned to one of the plaintiffs' counsel, that he thought *Thomas Bunter* was an incompetent witness, on the ground that he was interested in disproving the avowries, inasmuch as if the plaintiff failed in the action, *Thomas Bunter* would be liable in contribution to *James Bunter* for the costs, and therefore, that he was interested in the event of the cause; and the learned Judge stated in his report, that if the Court should be of opinion that *Thomas Bunter* was a competent witness under the circumstances, there ought to be a new trial. The plaintiff gave evidence to shew that the holding was not under a fixed pecuniary rent, but that the rent was to depend on the price of corn, and the learned Judge left that question of fact to the jury upon the evidence, and they found a verdict for the defendant. A rule nisi having been obtained in *Hilary* term last for a new trial, on the ground that *Thomas Bunter* should have been admitted as a witness.

1823.]

Barrow:
against
Wanam

Adam and *C. F. Williams* shewed cause. *Thomas Bunter* was not a party to the record, the question must therefore be considered as if he had been called as a witness and rejected. At the time when the witness was rejected, there was evidence to satisfy the learned Judge that the farm was in the joint occupation of the plaintiff and the witness. The avowry states such a joint occupation, and if the defendant had afterwards brought an action against the two *Bunters* for the money rent, this record would have been evidence against her. But even if that were not so, still the witness had a
direct

8881
1823.BUTLER
HUTCHES
GOSWELL
WARRER

direct interest in the event of the suit, for had the rent claimed been recovered, he would have been bound to contribute to the payment of that, and of the costs also. *Goodacre v. Breame.* (a) [Bayley J. You assume that the witness was jointly liable; might he not be competent to deny that on the *voir dire*.] As the case then stood, the witness was joint-tenant with the plaintiff, and the question as to the admissibility of a witness, must be decided upon what has been proved when he is called. Then there was a lease executed by the defendant's ancestor. The *Bunters* indeed had not executed, but they paid for it, kept it when sent to them, and paid rent with reference to it. The plaintiff and the witness must, therefore, be taken to have been joint-tenants. The witness was also incompetent, because he came to defeat a lease adopted, though not executed by him.

R. Bayley, contra, was stopped by the Court.

BAYLEY J. I think that *Thomas Bunter* was a competent witness, not having any direct interest in the event of the suit. It has been argued, that he had such an interest, first, because the verdict would be evidence in another action, between the defendant on one side and the plaintiff and the witness on the other; secondly, because he would be liable to contribute to the costs, if a verdict was found for the defendant. There might, also, have been a question, whether it would not have been for the benefit of *Thomas* to prevent a return of the goods being made, but no evidence was given to prove them joint property; if they had been, the defendant might

(a) *Peake N. P. C.* 174.

have put an end to the action by plea in abatement. The judgment in this case, whichever way it was given, could not be evidence in any other proceeding, for or against *Thomas*, as to the point decided, which was a question of tenure. In order to make a record evidence, the parties must be the same, or must be privies in estate, as heirs or devisees, or in character, as personal representatives. In either case the claim must be under a party to the record, or it will not be evidence; it would otherwise bind where there has been no opportunity of cross-examining the witnesses, either by the party to the subsequent cause, or by the person under whom he claims, which would be contrary to the well known rule upon this point. Secondly, it does not appear that *Thomas* would have been liable to contribution for the rent or costs, if the defendant had recovered in this action. As to the costs, it is sufficient to observe, that for any thing that appears, the plaintiff brought the action wrongfully. But it is said that the sum recovered by the defendant would have been a measure for contribution to be made by *Thomas*. That assumes that he was so connected with the plaintiff as to be liable for the rent. If that had appeared on the *voir dire*, it would have been difficult to shew that *Thomas* was competent; some evidence was given to raise that inference, but *Thomas*, if examined on the *voir dire*, might have rebutted it; and that is the constant course of proceeding. There was nothing to prevent him from explaining on the *voir dire* all that had before been proved. Then, as to his incompetency to contradict the lease, that would have been a sufficient objection if he had acted under it; but the evidence for the defendant does not prove that, for although the farm was occupied

1823,

BUTTS
against
WARRS
1823

1836/

*Ex parte
Widdowson*

paid, and the rent paid, yet *Thomas* always refused to sign the lease. If examined on the *voir dire* he might have explained that the payment of rent was made on behalf of his father. Upon the whole, I think that no such interest was proved as rendered *Thomas* inadmissible, and that as his evidence was improperly rejected, there must be a new trial.

HOLROYD and BEST Js. concurred.

Rule absolute.

The Earl of PORTMORE *against* BUNN.

Covenant by the reversioner against the assignee of the grantee. Declaration stated that *A.* and *B.* did grant licence for a term of years to *C.* to continue a channel open through the bank of a navigation, in order that the waste water might pass through the channel to the mills of *C.*, the latter paying a certain annual sum therein mentioned.

COVENANT. The declaration stated, that, by a certain indenture, bearing date the 19th day of *June*, 1798, made between *Charles*, Earl of *Portmore*, and one *Bennett Langton*, (since deceased) of the one part, and *Alexander Raby* of the other part, the said earl and *B. Langton* did give and grant licence unto *A. Raby* to continue one channel, opening, way, or passage through the west bank or side of the river *Wey*, near *Coze's* lock, seventy-eight feet wide, upon condition that *Raby* would repair, to the satisfaction of the said earl and *B. Langton*,

Breach, nonpayment of that annual sum. *Semble*, That upon the face of the declaration *A.* and *B.* must be considered as having the sole ownership of the navigation, and the sole power of granting this privilege; and, in that case, that the deed would operate as the grant of an interest in an hereditament, and that the assignee of the grantee would be liable to an action by the reversioner within the statute 32 Hen. 8. By the deed produced in evidence, *A.* and *B.* were described as persons having the greatest proportion or share in the profits of the navigation: Held, that by this deed it appeared, that the grantors had not the power of granting the privilege of which the deed as set out in the declaration purported to be a grant, and therefore that there was a variance.

Held, also, that the deed shewed that the assignee of the grantee was not bound by the covenants, inasmuch as it appeared that the grantors had not any legal or equitable estate in the real hereditament which the deed set out in the declaration purported to grant.

their

their heirs or assigns, in and upon the said channel, the tumbling-bay there, in order that the part of the waste or surplus water of the said river *Wey*, which would otherwise run through the sluices or water-gates of *Coxe's* lock, should pass over the tumbling-bay, through the channel head or weir belonging to the mills of *A. Raby*, lying near to *Coxe's* lock, to be possessed for the term of twenty-one years, to be computed from the 24th day of *June*, 1793, for the express purpose of working the mills of *Raby*, in such manner that the waste water should run over the tumbling-bay, and then should pass and run again into the said river *Wey*, through another channel thereby also granted; also, that the said earl did give licence and permission to *Raby* to navigate the river with vessels for the term of twenty-one years, upon paying 1s. a ton for every ton weight of iron, coals, and other goods, and at the same rate for every chaldron of coals; covenant, that *Raby*, his executors, administrators and assigns, would carry, in their boats on the river *Wey*, all the iron which should be made at those mills, with a proviso, that in case *Raby* should not navigate the said river with 4500 tons of iron or other goods or chaldrons of coals yearly, then that *Raby* should yearly pay, during the said twenty-one years, such sum of money as would make up the tonnage equal to 4,500 tons, so that there should be paid to the said earl and *B. Langton* the clear yearly sum of 225*l.* The declaration then averred, that the interest of *Raby* in the demised premises with the appurtenances, by assignment vested in the defendant, whereby he became entitled to and enjoyed the said licences, and all the benefits and advantages so demised as aforesaid; and that he continued in possession thereof until the 24th day of *June*, 1819, when the said demise ended. Breach, non-payment of three years' rent, 675*l.*,

and

1833,

—
The Earl of
Pembroke
against
Dove.

1823.

The Earl of
Portmore
against
Bury.

and 500*l.* for extra tonnage. Pleas, first, *non est factum*; second, that all the estate, right, title, and interest of him the said *A. Raby*, of, in, and to the said *demised* premises, benefits and advantages, with the appurtenances by assignment thereof made, did not legally come to and vest in the said defendant, and issue joined thereon. At the trial, before *Richards* C. B., at the Summer assizes for the county of *Surrey*, in 1822, the deed dated 19th day of *June*, 1798, was given in evidence. In that deed the Earl of *Portmore* and *B. Langton* were described as being the persons who had the greatest proportion or share in the profits of the river *Wey*, and it recited, that they had for several years past permitted *Raby* to dig, cut, and make the several channels, openings, ways, or passages therein described, and had also permitted him to take, use, and enjoy part of the waste or surplus water of the said river *Wey*, and that he, *Raby*, had applied to them to renew or continue such permissions, subject to the terms and conditions therein mentioned; and the covenants were by him for himself, his heirs, executors, administrators, and assigns; and the proviso was, that in case he, his executors, administrators, or assigns did not do the things therein mentioned, &c. The plaintiff's counsel referred to an act of the 22 & 23 *Car. 2.*, by which the river *Wey* was made a navigable river for ever, and the soil of the river and its banks were vested in certain persons (naming them) their heirs and assigns, upon the trusts therein mentioned, with power to elect new trustees; and it was enacted, that it should be lawful for any two persons having the greatest proportion or share in the profits of the river, to nominate and appoint one or more receiver or receivers of the profits of the river and navigation. This act was not given in evidence at the trial, but merely referred to. It was objected, on the

the part of the defendants, that there was a variance between the deed produced in evidence and that set out in the declaration, inasmuch as the declaration omitted the description of the grantors, and also the words "executors, administrators, and assigns."

1823,

The Earl of
PORTMORE
against
BUNN,

Chitty now shewed cause. If the deed, as set out in the declaration, contains a demise or grant of any lands, tenements, or hereditaments, the assignee of the grantee will be bound by the covenants, and, consequently, there will then be no ground for arresting the judgment, nor for entering a nonsuit, by reason of the omission of the words "executors, administrators, and assigns;" for the legal effect of the deed will then be the same, whether it contained those words or not. Now, if the declaration shows that the right of soil in the banks of the navigation belonged to the proprietors of the navigation, then there has in effect been a demise of so much of the bank as was necessary to make the channel, and the assignee of the grantee is bound by the covenants. *Buckridge v. Ingram* (a) is an authority to shew, that a right vested in the undertakers of a navigation, and their successors, to cut and make channels, constitutes a real hereditament. But taking it most strongly against the grantors, that the right of the soil in the bank belonged to *Raby*, still he held it subject to the right of the proprietors of the navigation, that the banks should be kept closed so that the water might not escape. That right of the proprietors constituted in them an incorporeal tenement or hereditament; and they granted for a term, their interest (b) in that tenement or hereditament to *Raby*. And then an action will lie by the reversioner of such

(a) 2 Ves. jun. 652.

(b) 1 Inst. 6 p.

1823.

The Earl of
Parramoor
against
Bunn.

tenement or hereditament against the assignee by the express words of the 82 Hen. 8. c. 34. That statute recites, that "divers ecclesiastical and religious persons had made leases, demises, and grants, to divers other persons of manors, lordships, farms, messes, lands, tenements, meadows, pastures, or other hereditaments," and then enacts, "that any person having any gift or grant of any lordships, manors, lands, tenements or hereditaments, or of any reversion of the same, and all other grantees or assignees, should have and enjoy all remedies by action for not performing of covenants contained in the said leases, demises or grants, against the lessees, farmers, and grantees, their executors, administrators, and assigns, as the lessors or grantors would have had, in like manner as if the reversion of such lands, tenements, or hereditaments had not come to the king." It is true, that the act of parliament under which the river *Wey* was made navigable, vests the soil in certain trustees, and not in the shareholders. That act, however, was not in evidence, and ought not to influence the judgment of the Court. Besides, *Raby* having taken an interest from Lord *Portmore* and *Langton*, the assignee is estopped from saying that they could not grant that interest. There is no authority to shew that the question, whether the covenant runs with the land, has any thing to do with the title of the lessor. It is sufficient if the subject-matter of the grant gets into the hands of the assignee. He cited *Webb v. Russell* (a), *Fairtitle & Milton v. Gilbert* (b), *Blake v. Foster* (c), 3. *Comyn's Digest* title *Covenant*, page 77.

Barnevall, contra, was stopped by the Court.

(a) 5 T. R. 393.

(b) 2 F. & R. 171.

(c) 5 T. R. 487.

BAYLEY J. I am of opinion that there is a variance between the deed set out in the declaration and that produced at the trial, and that no interest in any real hereditament passed from the original grantee of the licence to his assignee. All that we can assume from the deed as set out in the declaration, is, that the grantors had the power to grant the privilege thereby purported to be granted. It was not necessary, in order to enable them to make such a grant, that they should have the right of soil in the land over which the water flowed, or in the adjoining banks. They may have had a mere easement upon the soil of others, to make channels and towing paths, as in the late case of *Hollis v. Goldfinch* (a), and we cannot assume from the declaration that they had more. Such an interest, however, according to the case of *Buckridge v. Ingram*, would be a real hereditament. It must be assumed that they, as proprietors of the navigation, had a right to compel the several owners of the adjoining banks to keep the same closed so as to prevent the water from escaping out of its ordinary channel. That right against the several owners of the adjoining banks being annexed to their navigation, may, like a right of way over the lands of another, be so many incorporeal hereditaments; and the grant of their interest for a term of years in any such hereditament, might operate as the grant of an interest within the 32 Hen. 8., so as to make the assignee of the grantee liable to an action for a breach of covenant by the reversioner. It is unnecessary, however, to decide that question, for the defendant is entitled to our judgment upon other grounds. The deed, as set out in the declaration, imports that the plaintiffs had power

1823.

The Earl of
Portsmouth
against
Burr.

(a) *Ante*, 205.

1823.

The Earl of
Forbes
against
Bunn.

to grant the possession of the whole of that channel in such manner that *Raby* might insist that the whole of it should continue open during the term. The question therefore is, whether such a right as that described in the declaration actually did pass to the grantee by virtue of the deed which was given in evidence. That deed purports to be made by two persons describing themselves as having the greatest proportions or shares in the profits of the river *Wey*. They claim not to have the whole power over the river, but to a limited extent only. The deed recites, that they had for several years permitted *Raby* to cut the banks, ways, channels, &c. and to use and enjoy the waste water of the river; and then proceeds to give him permission to continue open that channel, &c. Upon the face of the deed, therefore, it appears that the interest of the grantors is limited to their own shares, and that they could not grant the whole of the water, but only so much of it as belonged to them. And, although the words of a grant be general, yet, where it appears by the deed that the grantor had a limited interest, the grant will be construed as co-extensive with and limited by the right of the grantor. The words of the grant must be interpreted, as if the grantors had expressly said, that they granted as far as they could. If that be so, then it is clear that the indenture is not truly stated upon the declaration. The declaration imports that the grantors had the entire right in the navigation; that they had granted all that they could in the character of sole proprietors; whereas by the deed it appears that they have granted so far only as their interest, as shareholders, permitted. This is clearly a variance. The effect of it does not stop there; for, when the nature of the right is considered, it shews that they had not the power of creating

creating any interest in a real hereditament, because they themselves were not seised of a real hereditament. They had it only jointly with others. That hereditament could only be granted for a term by all the shareholders, who must at least be tenants in common. Any one of the shareholders had a right to say that the river should continue in its original state, and that no one should destroy its banks or take the water from it. The deed could operate against the grantors only. It would merely bind them not to prevent *Raby* from having the water pass through this channel; but it would not bind the other shareholders from disputing that privilege. The legal effect of the deed, therefore, is a licence to use the water, subject to the right of others. The legal effect of the deed set out in the declaration is an absolute, unqualified licence to use the water, during the term, without any disturbance by others. It appears, therefore, by the deed, that the grantors had no power to grant the interest they profess to grant by the deed set out in the declaration. For these reasons, (without relying upon the act of parliament by which the river was made navigable) I am of opinion that there is a variance between the declaration and the evidence; and, upon the merits of the case, that both issues ought to have been found for the defendant; because the evidence shews that *Raby's* interest never passed to the defendants. The rule for entering a nonsuit must, therefore, be made absolute.

1823.

The Earl of
PORTMORE
against
BURN.

HOLBORN J. I am of opinion that there is a variance, and that, if the deed had been truly set out in the declaration, the defendant, as assignee, would not have been answerable in this action. The deed, as set out in the declaration, imports that the Earl of *Portmore* and

1823.

The Earl of
PORTMORE
against
Burr.

Mr. *Langton* had the whole interest in the navigation, and purports to grant a licence to *Raby* to continue open a channel to enable him to take all the water that could pass through a channel of such dimensions, for the purpose of turning his mill. The deed, therefore, as set out in the declaration, imports that the grantors had in the navigation a legal interest, which enabled them to grant, for a term of years, the privilege of keeping open the channel described, and of having the water pass through it. The grantees, under such a deed, would be estopped from disputing the title of the grantors in that respect; and I am of opinion that, if they had such a legal interest, and had made such a grant as is set out in the declaration, that it would have operated as a grant of an interest in a real hereditament, and that the assignee of the grantee would be liable for a breach of covenant contained in such grant, within the statute 32 Hen. 8. Then the question is, whether the deed produced in evidence is, in point of legal effect, the same as that set out in the declaration. If it be not, then there is a variance. I am clearly of opinion that it is not: because it shews that the grantors had not the entire interest in the navigation, but a proportion only, and, therefore, that they alone could not grant, as against their co-proprietors, the right of having the entire channel kept open. It shews, also, that Lord *Portmore* and Mr. *Langton* had not any legal or even equitable estate in the hereditament which the deed, as set out in the declaration, purports to grant; for it appears, by the deed itself, that they were merely entitled to a proportion of the profits of the navigation. The legal estate may have been in other persons. The equitable estate in the navigation must have been in the whole body of proprietors. The equitable estate in any

hereditament annexed to that navigation belonged to the body of proprietors, and not to any two shareholders. The deed produced in evidence, therefore, shews that Lord *Portmore* and Mr. *Langton* had not any legal or equitable estate in the hereditament, and, consequently, that no interest in such hereditament passed to the grantee or to his assignee. If the deed, therefore, had been truly set out in the declaration, the defendant would have been entitled to judgment, either on demurrer or in arrest of judgment. I am of opinion, first, that there is a variance; and, secondly, that an action is not maintainable upon this deed against the assignee of the grantee, because no interest in a real hereditament passed to the grantee, and, consequently, that the rule for entering a nonsuit must be made absolute.

BEN. J. I am of opinion, that if the grantors in this case had the entire interest in the navigation, they might be considered as having a real hereditament within the authority of the case of *Buckridge v. Ingram*; and that being so, that the deed set out in the declaration does import to convey such an interest to the grantee as would pass to the assignee under the statute of Hen. 8. The deed itself, however, when produced in evidence, shews that they had no such interest; for it thereby appears that they only held certain shares in the river. The deed, therefore, disproves the second issue; and upon that ground alone the defendant ought to have had that issue found for him. There ought also to have been a nonsuit on the ground of variance; because the plaintiff has not stated the deed, either in its words or according to the legal effect. If the act of parliament is to be considered as in evidence, it appears that the legal

1823.

The Earl of
Portmore
against
Buxy.

1823.

The Earl of
PORTMORE
against
BURN.

interest in the soil of the navigation was not in the grantors, but in the trustees; and then the grantors could not grant any interest in the real hereditament; and, consequently, no such interest would pass to the assignee, so as to make him liable to this action.

Rule absolute.

BAKER against DEWEY.

Declaration, that defendant was indebted to plaintiff in account, and thereupon, in consideration of the premises, and that plaintiff would take and accept the work and labour of the defendant as a plumber and glazier, at reasonable prices, to the extent of that debt, defendant promised to do the work. Counts for money had and received, &c. It was

ASSUMPSIT, that defendant was indebted to the plaintiff for tenements, rents, and premises, bargained and sold, and in consideration thereof promised to work out his debt in his trade as plumber and glazier. Second count, that defendant was indebted to plaintiff in account in the sum of 260*l.*, and thereupon, in consideration of the premises, and that plaintiff, at the request of defendant, would take and accept the work and labour of the defendant as a plumber and glazier at reasonable prices, to the extent of his debt, in payment thereof, defendant promised to do the work. Common counts for money lent and advanced, money had and received, &c. At the trial, before *Richardson J.*, at the

proved that the plaintiff, by deed, had assigned certain premises to the defendant for a sum of money therein mentioned. The deed stated that sum to have been well and truly paid, and released the defendant therefrom. Parol evidence was given to shew that, in fact, part of the purchase money had not been paid, but that it was agreed by deed between the parties at the time of the execution of the deed, that that part of the purchase money should be retained by the defendant, and that he should do work for the plaintiff to that amount. Held, that if this evidence was admissible, still it did not support the declaration: Held, secondly, that assuming the legal effect of the agreement to be, that the entire purchase money had been paid, and that part was returned in consideration of the defendant's promising to do work, the parol evidence would not contradict the deed, and would be admissible; but that inasmuch as the original debt was extinguished by the release in the deed, and no new debt was created, but merely an obligation to do work arising out of a new special contract that ought to have been declared upon.

last

last Summer assizes for the county of Somerset, the plaintiff proved a deed of the 25th March, 1820, by which, in consideration of 50*l.* paid to *Baker* by *Dewey*, the receipt of which said sum of 50*l.* was thereby acknowledged; and the defendant therefrom acquitted and released, the plaintiff bargained, sold, &c. to the defendant a plot of ground therein described, and a messuage or tenement thereon, for the remainder of a term of years, and a receipt for the purchase-money was indorsed upon the deed. Parol evidence was then given, that at the time of the execution of the deed no money in fact passed, and that the defendant, *Dewey*, both before and after the execution of the deed, stated that he was to work out the consideration-money in his trade of a plumber and glazier. The plaintiff then proved deeds of lease and release of the 28th and 29th August, 1820, by which, in consideration of 250*l.* to him, plaintiff, in hand, paid by *Dewey*, the receipt of which was thereby acknowledged, and the defendant therefrom acquitted and released, the plaintiff, *Baker*, bargained and sold to *Dewey* certain other premises, and a receipt for 250*l.* was indorsed upon the back of one of these deeds. These latter deeds were executed by *Baker* in August, 1820, and by *Dewey* on the 15th March, 1821, and on that day a written agreement (not under seal) was signed by both parties, by which it was stipulated, that *Dewey* was to retain 60*l.* out of the purchase-money, and to work it out in painters' and glaziers' work. An application having been made to the defendant to do work at some houses of the plaintiff, he refused, saying, he had already done too much. It was objected at the trial, that the oral evidence of the non-payment of the consideration-money in the first transaction, and the agreement

1823.

Baker
against
Dewey

1823.

Plaintiff
against
Defendant.

agreement reduced into writing in the second, were not admissible, inasmuch as it was in contradiction of the deeds, which expressly stated the purchase-money to have been paid, and contained releases for the same; and *Rountree v. Jacob* (a), and *Lampon v. Corke* (b), were cited. The learned Judge received the evidence, and directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose was obtained in last Michaelmas term; against which

R. Bayly now shewed cause. The parol agreement does not contradict the deed by which the premises were conveyed to the defendant. The deed admits the purchase-money to be paid, and releases the defendant from it. The parol agreement shews the mode in which it was paid, viz. by allowance in account; that in an account then opened between them is allowed to him on one side, as paid in consideration of work to be performed by him for the plaintiff, to that amount on the other side. *Jeffs v. Wood* (c) is an authority to shew that allowance in account is payment. Besides, it appears by the agreement that the defendant had so much money of the plaintiff in his hands, to be worked out by him, and when he refused to work it out, the consideration failed; then the plaintiff might recover it, either under the second count, which states the defendant to be indebted to the plaintiff in account, or under the count for money had and received, as being so much money had and received by the defendant to the plaintiff's

(a) 2 Tunt. 154.

(b) 5 B. & A. 608.

(c) 2 P. W. 128.

tiff's use. He also cited *Shipworth v. Green* (a), and *Goddard's case*, (b)

1823.

 BAKER
 against
 DAWSON.

Gaselee, contra, was stopped by the Court.

BAYLEY J. I am of opinion that a nonsuit ought to be entered. A party who executes a deed is estopped in a court of law from saying that the facts stated in that deed are not truly stated. In this case, *Baker* has executed deeds, in which it is expressly stated that the consideration for the purchase of the premises therein mentioned had been well and truly paid. He is precluded, therefore, from saying that any part of that money remains due as purchase-money. In point of fact, 50*l.*, which was the amount of the purchase-money in the first instance, and 60*l.*, part of the purchase-money in the second, were not paid. But it was stipulated that the defendant, who was a plumber and glazier, should do work in his trade on account of the plaintiff to that amount. The plaintiff is estopped by the deed from saying that the amount was not paid to him as purchase-money. He might be at liberty, however, to shew that, after the execution of the deed, part of the purchase-money was returned on the terms of doing certain work for the plaintiff. Assuming that that could be considered the legal effect of the agreement between the parties, which is the most favourable way of considering it for the plaintiff, the declaration in this case does not contain any count to meet such a case. The first count charges, in substance, that the defendant was indebted to the plaintiff for the purchase-money of the premises sold. The plaintiff is estopped by the deed from saying that the consideration for the purchase of the premises was not in fact paid, and,

(a) 3 Mod. 111.

(b) 2 Co. 4.

therefore,

1823.

BAKER
against
Dewey.

therefore, that count cannot be supported. All the other counts allege that the defendant was indebted to the plaintiff. Now there was no debt existing: any debt that ever did exist or might have existed, in respect of the premises sold, was put an end to by the release; and, assuming that it might be considered that part of the purchase-money was returned, on the terms of the defendant's doing certain work, that would not create a debt, but a special contract between the parties, which the plaintiff ought to have declared on. There is no evidence to shew that no part of the work had been done by the defendant. The fair inference from the evidence is, that some part had been done; and if so, the consideration has not wholly failed, and the count for money had and received is not maintainable. Upon the whole, I am of opinion, that the rule for entering a nonsuit ought to be made absolute.

HOLROYD J. I am of opinion that the plaintiff is not entitled to recover upon any of the counts in this declaration. The second count seems to be most applicable to the plaintiff's case. That count states, that the defendant was indebted to the plaintiff in account; and in consideration thereof, and that the plaintiff at the request of the defendant, would take and accept the work and labour of the defendant as a plumber and glazier, at reasonable prices, to the extent of his said debt, in payment thereof, defendant promised to do the work, &c. In support of his case, the plaintiff gave oral evidence, that, on the first transaction, no money whatever passed; and on the second, that, by an agreement in writing, it was stipulated, that Dewey was to retain in his hands 60l. out of the purchase-money, which was to be considered as part payment of the purchase-

chase-money, and for which *Dewey* was to do and perform work to that amount as a plumber and glazier, for *Baker*. If this agreement be inconsistent with the deed, it ought not to have been received in evidence. I incline to think, at present, that the parol agreements are not inconsistent with the deed. By the deed the whole purchase-money was acknowledged to be well and truly paid, and the defendant was released therefrom. Both parties are estopped by the deed from saying that the whole purchase-money was not paid. I doubt whether the true nature of the transaction may not be taken to be in effect, the purchase-moneys being stated and considered by the deeds to have been paid, as if, after the execution of the deeds, and after the vendor had received the purchase-money, as the deeds import, he returned the vendee part, in consideration of the latter's doing the work mentioned in the agreement. If that were the real nature of the agreement between the parties, or if that had been the fact, it is not inconsistent with the deed, and was admissible in evidence. But, assuming that to be so, there is no count in the declaration applicable to such a case. Supposing that the consideration-money had been actually paid, and part returned as a re-loan, to be again repaid *in money*, that would create a fresh debt, but no part of the former debt would remain. But here there is no re-loan; for that money is not to be again repaid by the vendee, but he the vendee is to do certain work instead of repaying it. This cannot be considered as a loan of money, which is itself to be repaid. When goods have been sold, to be paid for at the end of one month, by a bill at two months, it has been held, that, until the expiration of the three months, the contract must be declared upon specially. I think, therefore, that the original debt was
extin-

1823.

 BAKER
against
DEWEY.

1823.

BAKER
against
DREW.

extinguished by the deed; and even supposing that this might be considered as a return of so much of the purchase-money, in consideration of the vendee's doing the work, upon which I pronounce no decided opinion, still that would not create any debt between the parties, but a mere contract on the part of the vendee, in consideration of money returned, to do certain work. The declaration does not contain any count upon such a contract, and, therefore, the rule for entering a nonsuit must be made absolute.

Bar J. I am of opinion, that the parol evidence was inconsistent with the deed, and ought not to have been received. It was competent to the parties after the execution of the deed to return the whole or any part of the purchase-money actually paid, and to stipulate, that, in consideration of the money so returned the vendee should do certain work. Such an agreement would create a fresh contract, perfectly consistent with the statement in the deed, but the contract given in evidence is of a very different description, and is wholly inconsistent with the deed, for it was agreed that the vendee should retain in one instance the whole, and in the other a part of the purchase-money. The deed states the whole purchase-money to be well and truly paid. The parol evidence is, that it never was paid, but a great part of it kept back; and that fact is wholly inconsistent with the statement in the deed, and, therefore, ought not to have been received in evidence. The cases of *Rowntree v. Jacob* and *Lampon v. Corke* are authorities in point. Upon that ground, I am of opinion, that the rule for entering a nonsuit ought to be made absolute.

Rule absolute.

1823.

The King against LAWRENCE KENWORTHY.

THE defendant was indicted and tried for perjury, at the Chester Summer assizes, 1823, and found guilty. After the entry of the verdict, the record proceeded as follows: "Whereupon all and singular the said premises being seen by the said justices here, and fully understood, it is therefore ordered, that he the said *Lawrence Kenworthy* be transported to the coast of *New South Wales*, or some one or other of the islands adjacent, for and during the term of seven years; and that he the said *L. Kenworthy* be in mercy," &c. The record being removed into this court by writ of error, various errors were assigned, of which the following were afterwards relied upon in argument: that the judgment was erroneous in form, being "It is ordered," whereas it should have been "It is considered;" that it was bad in substance, being a judgment of transportation only, whereas the 2 G. 2. c. 25. s. 2. enacts that judgment of transportation may be pronounced, *besides* the punishment that might before be inflicted; that the place to which the prisoner was to be transported ought not to have been fixed by the Court, the power of appointing that being given to the king in council, by 56 G. 3. c. 27.; and that at all events the appointment of the place was bad, being to one or other of various places, and, therefore, uncertain. Joinder in error.

Upon a conviction at the Chester assizes for perjury, the following entry was made upon the record: "It is therefore ordered, that the said *L. K.* be transported to, &c., for and during the term of seven years." Upon error, Held, that the entry was merely an order, and not a judgment; and a procedendo was awarded, commanding the court below to proceed to give judgment. The prisoner was, in the mean time, admitted to bail.

See King v. Ellis 5 B. & C. 599

D. F. Jones, for the prisoner. The judgment pronounced by the court below is erroneous, both in form and

1823.

The King
against
KENWORTH.

and substance. In 4 *Inst.* p. 70. there is this passage: "This conclusion followeth, that the king hath committed and distributed all his whole power of judicature to several courts of justice, and therefore the judgment must be, "*ideo consideratum est per curiam.*" That is the term settled and appointed by the law to be used for expressing the judgment of the Court; and if any other be used the judgment is erroneous, and may for that cause be reversed. *Ventris v. Carter* (a), *Robins v. Sambel* (b), *Slocumb's case* (c), and many other cases to the same effect, are collected in *Com. Dig.* (d) [Abbott C. J. Perhaps no judgment at all has been given; and if so, there cannot be any reversal.] If that be so, the prisoner is now detained without any lawful authority, and entitled to be discharged; for the court below not having respited the judgment until any future time, cannot now pronounce it, neither can this Court, *Rex v. Baker.* (e) Whatever may be the power of this Court in other cases, they certainly cannot pronounce judgment upon a record removed from an inferior court, where the punishment is discretionary; for they cannot collect the circumstances of the case from the record, so as to measure the punishment, *Rex v. Nichols.* (f) Besides, the act under which the defendant was indicted, directs that judgment shall be pronounced by the court before which the conviction takes place. Then, as to the substance of the judgment, the court below had no power to pass judgment of transportation only. 2 G. 2. c. 25. s. 2. enacts, that judgment of transportation may

(a) *Yelv.* 130.(b) 5 *Bull.* 92. *Cro. Jac.* 326. *S. C.*(c) *Cro. Car.* 442.(d) *Th. Comis* (P 13).(e) *Cart.* 6.(f) 13 *East*, 412. n.

be pronounced, *besides* the punishment which might before be inflicted. Now, where the law appoints a particular punishment for any offence, there is no power to alter that in the judgment, either by addition or diminution. *Rex v. Walcott.* (a) *Rex v. Reed.* (b) Lastly, the Court below should either have sentenced the prisoner to be transported to such place as the king in council should appoint, or should have ordered him to be transported generally; in which case the appointment of a place would have been given to the king in council, by the 58 G. 3. c. 27. Instead of that, the judgment of transportation being to one or other of several places is bad, because the Court had no power to appoint any place; and even if they had, still the appointment would be bad for uncertainty.

1823.

~~-----~~
The King
against
Kerwenray.

Littledale, *contra*. It must be admitted that this Court cannot pronounce judgment, as the statute says that it shall be pronounced by the Court before which the party is tried. But here no judgment has been given; the writ of error, therefore, issued too soon, and must be quashed, or, at all events, this Court will order the Court below to give judgment.

ABBOTT C. J. By the act in question, two things are required to be done by the Court before which the party is tried: An order for transportation is to be made, and thereupon judgment is to be given. Now, here, the the Court made an order not followed up by a judgment. There is no doubt that, at common law, where the punishment is not discretionary, the record of an in-

(a) 4 *Med.* 395.(b) 16 *East*, 404.

1822.

**The King
against
KENWORTHY.**

ferior Court may be removed into this Court, and we may pronounce judgment; but in this instance we cannot do so. Inasmuch, therefore, as no judgment has been entered below, and this Court has no power to supply the deficiency, the proper course appears to be for us now to order the Court below to proceed to give judgment on the conviction.

Procedendo awarded.

The prisoner was now brought up before the three Judges sitting in bank, by the overseer of the hulks at *Woolwich*, on a writ of habeas corpus issued by the Lord Chief Justice. The return set out the order made by the court before which the prisoner was tried, as stated above.

D. F. Jones contended, that the order being insufficient, the prisoner was entitled to be discharged; but the Court said, that, as they had already directed that the Court below should proceed to give judgment, they would not allow that matter to be again discussed.

Jones then requested that the prisoner might be admitted to bail; against which

Littledale shewed cause; but the Court thinking him entitled to be bailed, an order was drawn up, that he should be committed to the custody of the sheriff of the county of *Chester* and constable of the castle of *Chester*, to be kept in safe custody until he should give bail for his personal appearance at the next session of *Chester*, then and there to receive the judgment of that Court for the offence above mentioned.

1823.

CHARLES JONES *against* WILLIAM THORNE.

THIS case was sent by the Master of the Rolls, for the opinion of this Court.

At the time of granting the lease next hereinafter mentioned, *Thomas Postlethwaite* was possessed of the premises thereby demised, and of other houses, buildings; and premises adjoining thereto and in the neighbourhood thereof, under a lease thereof, granted to him by *Elizabeth Doughty*, of *Bedford-row*; and such several adjoining and neighbouring premises, or the greater part thereof, were occupied by his tenants.

By lease, of the 1st *February*, 1806, *Postlethwaite* demised to the said *W. Thorne* a piece of ground, situate on the west side of *Gray's Inn Lane* road, in the county of *Middlesex*, with the abutments and dimensions therein mentioned, together with a double brick-built messuage, built on the front of the ground towards the east, and which said messuage was described as the third house southward from *Guildford-street*, habendum from the 24th *June* then last past, for eighty-six years, at the rent therein mentioned. The lease contained the following covenant and proviso: "That he the said *W. Thorne*, his executors, &c., should not nor would, during the said term, do, or willingly cause or suffer to be done, any act, matter, or thing whatsoever, in or upon the said demised premises, or any part thereof, which might be, grow, or lead to the damage, annoyance, or disturbance of the said *T. Postlethwaite*, his executors, &c., or any of his or their tenants, or to any of the tenants of Mrs.

Lessee covenanted that he would not do any act, matter, or thing upon the demised premises, which might be, grow, or lead to the damage, annoyance, or disturbance of the lessor, or any of his tenants, or to any part of the neighbourhood; and the proviso for re-entry was, that the lessee should not permit any person to inhabit the premises who should carry on certain specified trades or businesses, (that of a licensed victualler not being one of those,) or any other business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants: Held, that the opening of a public-house upon the premises was not a breach of the covenant or proviso.

1823.

~~James~~
 JAMES
 against
 THORNE.

Elizabeth Doughty, her heirs or assigns, in the said parish of *St. Pancras*, or to any part of the neighbourhood." It also contained the following proviso: "Provided always, that if it should happen that the said yearly rent, or any part thereof, should at any time during that demise happen to be in arrear and unpaid, in part or in all, by the space of fourteen days, or if the said *W. Thorne*, his executors, administrators, or assigns, should happen to fail or make default in the due performance of all or any of the covenants and agreements thereinbefore contained, on his and their part and behalf to be performed, observed, and kept, or if the said *W. Thorne*, his executors, administrators, or assigns, should permit or suffer any person or persons to inhabit or dwell in or upon the said demised messuage, buildings, and premises, or any part thereof, who should therein or thereupon use or carry on the trades or businesses of a brewer, bagnio-keeper, distiller, dyer, pipe-burner, melting tallow-chandler, soap-boiler, farrier, smith, or iron-founder, or permit or suffer a forge to be erected thereon, or on any part thereof, or suffer the same to be made use of as or for a spunging or lock-up-house or sheriff's office, or lottery-office, or any other public office whatsoever, or as or for an auction or sale-room, or broker's shop, or any other trade or business that might be or grow or lead to be offensive, or any annoyance or disturbance to any of the tenants of the said *T. Postlethwaite*, his executors, administrators, or assigns, or his or their landlady, her heirs or assigns, then in either of the said cases, it should be lawful for *Postlethwaite*, his executors, &c., to enter and to repossess the same and expel *Thorne*." *Thorne* entered by virtue of the lease into the possession of the demised

premises, and in *September*, 1821, entered into a written agreement with the plaintiff, *Charles Jones*, by which, after reciting the above lease, *Thorne* agreed to grant to *Jones* a sub-lease of the premises for sixty-two years, subject to the like covenants as in the original lease; and this agreement contained a clause by which *Jones* was to indemnify and save harmless *Thorne* from all damages and expenses, in case he, *Jones*, should open the house as a licensed victualler. A lease of the premises, pursuant to the terms of the agreement, was duly executed by *Thorne* to *Jones*, and the said messuage or tenement and premises have been opened by *Jones* as a public-house, under a licence obtained for the same, previous to the execution of such lease, and the said *W. Thorne* had full notice thereof before he executed the lease. Upon these facts the question for the opinion of this Court was, whether, by the granting of the said lease by *Thorne* to *Jones*, and the opening of the said messuage or tenement as a public-house, or by either of those acts, the covenants and provisoes contained in the lease of the 1st *February*, 1806, from *Postlethwaite* to *Thorne*, or any or either of them, had been broken. The case was argued at the sittings after last *Easter* term.

Marryat, for the plaintiff. The covenant and proviso in the lease are broken by the fact of *Thorne* having suffered *Jones* to open the house as a public-house. By the terms of the proviso a right of re-entry was reserved, if the lessee permits any person to inhabit the premises who should carry on certain specified trades, or who should suffer the same to be made use of for a spunging-house, or lock-up-house, or sheriff's office, or lottery-office, or any public office whatsoever, or an auction or sale

1823.

Jones
against
Thorne.

1873.

James
v. Keeling
1873.

rooms, or a broker's shop. The intention of the parties is clear, that the place should not be made a place of public resort. It then goes on to say, "or any other trade or business that might grow or lead to be offensive, or any annoyance or disturbance to any of the tenants, &c." Now a public-house is a place of public resort, and very likely to grow or lead to be an annoyance or disturbance to the neighbours. The very circumstance of its being placed under the control of the magistrates shews that it is likely to become an annoyance to the neighbours. The lessee covenants not to do any thing which might grow or lead to the damage, annoyance, or disturbance of any of the tenants. A public-house would necessarily produce inconvenience to the neighbourhood, by drawing to the spot a large resort of persons; which it was the intention of the parties to prevent. *Doe v. Keeling (a)* is an authority in point. There the covenant was, that the lessee should not exercise upon the premises any trade or business; and it was held, in an ejectment brought for a forfeiture, that the business of a schoolmaster was a trade or business within the meaning of such a covenant, on the ground that it must be an annoyance to the neighbourhood, by the disturbance which the inmates of the house would create, and by drawing to the spot a large resort of persons. Those reasons apply equally to a public-house. Upon the authority of that case, the opening of a public-house was a breach both of the covenant and proviso.

Littledale, contra. It is not stated in the case that the public-house in question is an annoyance to the

AT

(a) 1 M. & S. 96.

tenants,

tenants, or likely to become so. Whether it be so or not must depend mainly on the character and condition of life of these tenants. For a public-house might be a nuisance in one situation and a great convenience in another; and there is nothing stated in the case from which the Court can collect that the opening of this public-house was any annoyance to the other tenants. [Holroyd J. The Court is bound to consider this case as they would if the plaintiff had brought an ejectment for the forfeiture, and at the trial had proved only the granting of the lease, and that a public-house had been opened upon the premises.] By the express terms of the lease the lessee is prevented from using the premises for the purpose of carrying on certain trades therein enumerated, and that of a licensed victualler is not included in the number. It is true, that there are the words "any other trade or business that might grow or lead to be offensive to the tenants." But it is a general rule of construction in all instruments, that where a specific term is used in the first instance, it shall receive no extension by a subsequent general term. *Archbishop of Canterbury's case.* (a) *Countess of Bridgewater v. The Duke of Bolton.* (b) Applying that rule of construction to the present case, the business of a licensed victualler does not fall within the proviso. If it were held to fall within those words, it would equally extend to the business of a tanner, a slaughter-butcher, a brazier, or a glass-manufacturer, nay, even to that of a common butcher; for in hot weather his trade might become an annoyance to his neighbours.

1823.

James
vs
James

(a) 2 Co. 46.

(b) 6 Mod. 107.

1823.

JONES
against
THORNE.

The following certificate was afterwards sent:

This case has been argued before us, and we are of opinion, that by the granting the lease by the said *William Thorne* to *Charles Jones*, and the opening the said messuage or tenement as a public-house, or by either of those acts, the covenants or provisions contained in the lease have not been broken.

J. BAYLEY...

G. S. HOLROYD.

W. D. BEST.

1823. The following certificate was afterwards sent: This case has been argued before us, and we are of opinion, that by the granting the lease by the said *William Thorne* to *Charles Jones*, and the opening the said messuage or tenement as a public-house, or by either of those acts, the covenants or provisions contained in the lease have not been broken.

Admrs. Adams 6-2 B. Rpts. do

1823.

HENRY WARTER and MARGARETTA MARY ELIZABETH WARTER, Infants, by RICHARD BROWN, their next Friend, *against* JOHN HUTCHINSON and MARGARETTA ELIZABETH MEREDITH WARTER, an Infant, by JANE WARTER, her Mother and Guardian, and the said JANE WARTER;

AND BETWEEN

The said JANE WARTER and MARGARETTA ELIZABETH MEREDITH WARTER, an Infant, by the said JANE WARTER, her Mother and next Friend, *against* The said JOHN HUTCHINSON, HENRY WARTER, and MARGARETTA MARY ELIZABETH WARTER, Infants, by JOHN WARTER, their Guardian.

THE Vice-Chancellor sent the following case for the opinion of this Court:

Thomas Meredith made his last will in writing of the 8th September, 1801, duly attested to pass real estates;

4. by will charged his real estates with the payment of his debts and funeral expenses; and subject thereto, devised the same to

trustees in trust, to permit two persons therein mentioned to receive two annuities out of the rents and profits of the premises; and subject to the said annuities he devised the same to the trustees, their heirs and assigns, until his nephew *J. W.* should attain the age of twenty-one years; and if he should die in the mean time, until his nephew *H. W.* should attain the age of twenty-one years; and if he should die in the mean time, until his niece *M. W.* should arrive at that age, upon the uses, trusts, and purposes therein declared concerning the same; viz. that the trustees should raise out of the rents and profits, by sale or mortgage, a sum sufficient to pay his debts, funeral expenses, and legacies; and then that they should apply a proper sum out of the rents and profits of the premises for the maintenance and education of his nephew *J. W.* until he should arrive to the age of twenty-one years, and when he arrived at that age, then upon trust to pay him the rents and profits of the premises, if any should remain in their hands after payment of debts, &c.; and if

J. W.

1823.

WARTER
against
HUTCHINSON.

J. W. should happen to die before he attained twenty-one years, then upon trust to apply a sufficient sum arising out of the rents and profits for the maintenance and education of his nephew *H. W.* till he should attain the age of twenty-one years, and when he should arrive at that age, then upon trust to pay him the residue of the rents and profits, if any should remain in their hands

after payment of debts, legacies, &c., and in the mean time to place out at interest the rents and profits arising from the estate for their benefit; and when and as soon as the said *J. W.* should attain the age of twenty-one years, or in case of his death, when and as soon as the said *H. W.* should arrive at that age, or in case of his death, when and as soon as the testator's niece *M. W.* should arrive at the age of twenty-one years, he devised his real estate, subject as aforesaid, to the said trustees, their heirs and assigns, to and upon the uses, intents, and purposes as thereafter declared concerning the same; viz. to his nephew *J. W.*, and his heirs and assigns for life; and after the determination of that estate, to the use of the trustees, their heirs and assigns, for the life of *J. W.*, in trust to preserve contingent remainders, yet to permit the said *J. W.* and his assigns to receive the rents and profits for his own use during his life; and immediately after the decease of the said *J. W.* to his first and other sons and daughters in tail, and for default of such issue, to the use of his nephew *H. W.* and his assigns for life, and after the determination of that estate, to the trustees for his life to preserve contingent remainders; and after the decease of the said *H. W.*, to the use of his first and other sons and daughters in tail, and in default of such issue, to the use of his niece *M. W.* for life; and after her decease, to the use of her first and other sons and daughters in tail, and in default of such issue, to the use of his other, her heirs and assigns, for ever. *J. W.* having survived the testator, died before he attained the age of twenty-one years, leaving a daughter surviving him. *M. W.* attained the age of twenty-one years: Held, first, that under this will, the trustees took only a chattel interest in the estates devised to them.

Secondly, That *J. W.* took a vested estate for life,

Thirdly, That his daughter took an estate in tail male on the death of her father,

Fourthly, That *H. W.* took, at the death of the testator, a vested estate for life in remainder, expectant on the death of his brother *J. W.*, and failure of his sons and daughters and issue male of such sons and daughters.

and the same, so far as regarded the devise of the real estate, was in the words following: *I, Thomas Mordaunt, of Rensleyham-Hall, in the county of Denbigh, do make this my last will and testament: First, I direct all my just debts and funeral expenses to be paid and discharged by the trustees and executors hereinafter named, and for which purpose I hereby charge all my messuages, lands, &c. with the payment of the same, in aid of my personal estate; and subject thereto, I devise all my said messuages, lands, &c. with their appurtenances, unto the Rev. B. Yorke, B. Lloyd, and John Hutchinson, and to their heirs and assigns, subject to the several uses and estates, and to and for the several intents and purposes hereinafter particularly limited and declared, touching the same respectively; that is to say, in trust, to permit my sister Margaretta Warter, the wife of Joseph Warter, for her life, to take out of the said messuages, lands, &c. an*

annuity or rent-charge of 200*l.* to be paid as therein mentioned, with power of entry and distress in case of non-payment; and upon farther trust, to permit my aunt *Norton* to receive another annuity of 100*l.* payable as therein mentioned, with the like power of distress; and subject to the two several annuities, I devise the said messuages, lands, &c. to the said *B. Yorke, R. Lloyd,* and *John Hutchinson,* their heirs and assigns, until my nephew *John Warter,* the son of my sister, the said *Margaretta Warter,* shall attain the age of twenty-one years; and if he shall die in the mean time, until *Henry Warter,* the second son of the said *Margaretta Warter,* shall arrive at that age; and if the said *Henry Warter* shall die in the mean time, until the daughter of the said *Margaretta Warter* shall arrive to that age; to, for, and upon such uses, trusts, intents, and purposes as herein-after declared touching and concerning the same, that they the said trustees, and the survivor of them, his heirs and assigns, do and shall, in the first place, as soon as conveniently may be after my decease, raise out of the rents and profits of the premises, or by sale or mortgage thereof, or of a competent part thereof, money sufficient to pay and satisfy my just debts, funeral expences, and all costs and charges incurred by them in executing the will, and legacies of 100*l.* to each of them; and upon trust that they the trustees shall raise out of the rents and profits of the said premises, or by sale or mortgage thereof, the sum of 2000*l.*, together with all costs and charges attending the raising of the same, and to pay the same to the said *Henry Warter,* the younger son of my sister *Margaretta Warter,* as soon as he attains the age of twenty-one years; and if my said sister

1823.

 WARTER
against
HUTCHINSON.

1823.

WALTER
against
HITCHINS.

sister shall happen to have more than one younger child, that then in such case I direct my said trustees to raise out of the rents, issues, and profits of the premises, the full sum of 3000*l.* and pay the same to and amongst such younger children, share and share alike, as soon as they shall severally attain their respective ages of twenty-one years; and I do hereby charge all and every the said hereditaments and premises to and with the payment of the same; and upon further trust that they the said trustees, and the survivor of them, his heirs and assigns, shall pay and apply a proper sum of money, arising from the rents and profits of the premises, for the maintenance and education of my nephew *John Warten* till he shall arrive to the age of twenty-one years; and when he the said *John Warten* shall attain that age, then upon and in trust to pay him the residue of the rents, issues, and profits of the premises, if any should remain in their hands after payment of my debts, funeral expences, and the sum of 2000*l.* or 3000*l.* as the case may happen; and if *John Warten* shall happen to die before he attains the age of twenty-one years, then and in such case I direct my said trustees, and the survivor of them, his heirs and assigns, to pay and apply a sufficient sum of the money arising from the rents and profits of the said premises for the maintenance and education of my nephew *Henry Warten* till he shall attain the age of twenty-one years; and when *Henry Warten* should arrive at that age, then upon trust to pay him the rest and residue of the rents, issues, and profits of the said premises, if any shall remain in their hands after payment and satisfaction of my just debts, and the money intended for my sister's younger children

children as aforesaid; and in the mean-time to place out the money arising from the rents and profits of the said premises at interest for their benefit and advantage; and when and as soon as the said *John Warter* shall attain the age of twenty-one years, or in case of his death, when and as soon as the said *Henry Warter* shall arrive at that age, or in case of his death, when and as soon as the daughter of the said *Margaretta Warter* shall arrive at the age of twenty-one years, I give and devise my said other messuages, lands, &c., with their respective appurtenances, subject as aforesaid to the said trustees, their heirs and assigns, to, for, and upon such uses, intents, and purposes as hereinafter declared concerning the same; that is to say, to the use of my said nephew *John Warter*, his heirs and assigns, for his life, without impeachment of waste; and from and immediately after the determination of that estate, to the use of the said trustees, their heirs and assigns, for and during the life of the said *John Warter*, in trust only to preserve contingent uses and estates from being barred or destroyed, and for that purpose to make entries, &c.; yet, nevertheless, in trust to permit the said *John Warter* and his assigns to take the rents and profits thereof to his and their own use and benefit during his life; and from and immediately after the decease of the said *John Warter*, to the use of the first, second, third, and all and every other son and sons of the body of the said *John Warter*, lawfully issuing, severally, successively, and in remainder as they and every of them shall be in priority of birth and seniority of age, and of the several and respective heirs male of his and their respective body and bodies lawfully issuing, the elder of such son

and

1823

WARTER
against
HUTCHINSON.

1788.

WARTER
against
HUTCHINSON.

and sons, and the heirs male of his body issuing, being always to be preferred and to take before the younger of them, and the heirs male of his and their body and bodies issuing; and in default of such issue to the use of the first, second, third, and all and every other daughter and daughters of the body of the said *John Warter* lawfully issuing, severally, successively, and in remainder, one after another, in like manner as to the sons and for default of such issue; to the use of my nephew *Henry Warter*, the second son of the said *Margaretta Warter*, and his assigns for life, without impeachment of waste, and from and immediately after the determination of that estate, to the use of said trustees, their heirs and assigns, for and during the life of the said *Henry Warter*, in trust only to preserve contingent uses and estates from being barred or destroyed; and from and after the decease of the said *Henry Warter*, to the use of my sons and daughters in like manner as to the sons and daughters of *John Warter*; and in default of such issue, to the use of my niece, the last-born child of my sister *Margaretta Warter*, who was born in August last, and her assigns, for life, without impeachment of waste, and after her decease to the use of her sons and daughters, in like manner as to the sons and daughters of *John* and *Henry Warter*; and in default of such issue, to the use of my sister the said *Margaretta Warter*, her heirs and assigns for ever, and to and for no other use, intent, or purpose whatsoever. There then followed a proviso, by which every person becoming entitled to his estate was directed to take upon himself the name of *Meredith*, and to make *Penelope Anne Hall* his common place of residence; and the will was to be void with respect

respect, to any person refusing to do either of those things.

The testator died on the 14th April, 1802, and his will was proved by his executors on the 21st June, 1802, in the Consistory Court of St. Asaph: *Joseph Warter*, *Margaretta*, his wife, *John Richard Meredith Warter* (in the will called *John Warter*) their eldest son, *Henry Warter*, their second son, *Margaretta Mary Elizabeth Warter* their daughter; all survived the testator: *Thomas Yorke*, *Richard Lloyd*, and *John Hutchinson*, all survived the testator; but *B. Yorke* and *R. Lloyd* were both since dead, and the said *J. Hutchinson* is now the only surviving devisee of the testator's said real estates.

John Richard Meredith Warter, on or about the 6th April, 1817, departed this life without having attained his age of twenty-one years, leaving *Margaretta Elizabeth Meredith Warter*, his daughter and only child and heir at law, him surviving; and letters of administration of the estate and effects of the said *John Richard Meredith Warter* have, since his death, been granted to *Jane Warter*, who is now his legal personal representative.

The said *Henry Warter*, named in the will of the testator, attained his age of twenty-one years on the 16th of November, 1821.

The questions for the opinion of the Court were:

First, Whether *B. Yorke*, *R. Lloyd*, and *J. Hutchinson* took any, and what estate, in the estates devised to them by the will of the testator, *Thomas Meredith*?

Secondly, Whether, upon the testator's death, *John Richard Meredith Warter* took any, and what estate, in the said devised estates and premises?

Thirdly,

1828J

WILLIAM
HUTCHINSON.

1823.

WARRS
against
HUTCHINGS.

Thirdly, Whether *Margaretta Meredith* *Warter* the infant, took any, and what estate, in the said devised estates and premises; and if any, at what period?

Fourthly, Whether upon the said testator's death, or upon the death of the said *John Richard Meredith Warter*, under the age of twenty-one, the said *Henry Warte* took any and what estate in the said devised estates and premises?

Fifthly, In case the Court should be of opinion that the said *B. Yorke*, *R. Lloyd*, and *J. Hutchinson*, took the fee in the said devised estates, in which case the second, third, and fourth questions, as above stated, will not call for any answer, then assuming, for the sake of the question, that a chattel-interest only passed to the said *B. Yorke*, *R. Lloyd*, and *J. Hutchinson*, what estates or interests severally did the several persons take who are named in the second, third, and fourth questions?

This case was argued at the sittings after last *Hilary* terms, and it having been previously intimated that it involved a question of some difficulty, the Lord Chief Justice attended on the day when it was argued.

Preston. The trustees took in the first instance a determinable fee, and, consequently, the subsequent gift to them to uses was a gift to arise on the event that the fee previously given should determine. It would determine if *John* attained twenty-one, but if *John* died under twenty-one, then if *Henry* should attain twenty-one; and if *Henry* should die under twenty-one, then if *Margaretta* should attain twenty-one. In case the trustees took a determinable fee, the consequence is that

that all the subsequent limitations were to operate, and would arise by executory devise. No gift whatever of the fee would have taken effect under the will, in case all these three persons had died under twenty-one. It is clear that the trustees were not to take the entire fee simple, at all events, but for a limited purpose only, determinable when *John* should attain twenty-one, or *Henry* should attain twenty-one, or *Margaretta* should attain twenty-one; when any one of these three persons should attain twenty-one the devise to uses was to arise. The intention is simple, though incorrectly or inadequately expressed. The object of the testator was to provide trustees for infants who were the objects of his bounty during their minority. Besides, if *John* had attained twenty-one, in that very moment the estate of the trustees would have ceased, and the ulterior limitations contained in the will for the objects of the testator's bounty would have vested; and then the trustees would have become trustees for his life, for supporting contingent remainders, expectant on his death, and not trustees of a fee. It is incompatible with their having the fee simple that, by the subsequent parts of the will, they should be trustees for the life of *John*, of *Henry*, and *Margaretta* respectively. It is a necessary consequence, therefore, that they must have taken a determinable fee or other limited interest only.

Secondly. The trustees took a determinable fee and not a chattel interest. The gift is to them and their heirs until *John* should attain twenty-one, and in case he should die under twenty-one, then until *Henry* should attain twenty-one, and so on. Now a gift to trustees and their heirs until a person shall attain twenty-one may be a determinable fee, and there is not in this case

1823.

 WATTS
 against
 HENDERSON.

1823.
 WATKINS
 against
 HARRISON.

any reason why it should be construed to give a chattel interest. Indeed, there is one cogent reason why the trustees should take a determinable fee rather than a chattel interest. If they take a chattel interest, then on their death their *executors* would become trustees. The testator, however, has given the estate to the trustees and their *heirs*. The effect of a construction which would give the trustees a chattel interest would be to change the character of the succeeding trustees from heirs to executors. It is, by the rule of law, impossible that the trustees should have an estate to them and their *heirs* during a minority, unless that estate be for life or in fee. It must be an estate in fee, unless it be clear that it is determinable at all events by death. A gift to *A.* and his heirs, until *B.* shall attain twenty-one, is an estate in fee, to become absolute if *B.* dies under twenty-one; while if it is to be clearly collected from the words of the gift, that the interest is to cease, as well by death as by minority, then there is an estate for life. *Tracy v. Lethulier* (*a*) is an authority to shew that the gift to the trustees is in this case a determinable fee. That case has not been correctly represented by *Fearne* (*b*); for no remainder, after a determinable fee, though given for a particular purpose, can be vested. And, indeed, the report of that case by *Atk.* shews that the limitation over vested only after the prior interest had been defeated or determined. Thus *Tracy v. Lethulier* is not, as generally supposed, an anomaly on a departure from principle, but consistent with the facts and events; and the doctrine of the court was applied only to the limitation over after the event had happened.

(*a*) 3 *Atk.* 774, 4 *MSL* 204.

(*b*) *Conting. Rem.* 224, 6th edit.

and

and it is consistent with principle that the ulterior gift should have conferred a contingent interest while the determinable one continued, and a vested fee after the determinable fee had ceased. In the case of *Wright v. Pearson* (a) Lord Hardwicke declared, that a gift to trustees and their heirs could not be a chattel interest, because, in the event of the death of the trustees, their executors, instead of the heirs, would be the trustees, which was contrary to the express intention of the testator.

1823.
WALTER
against
HUTCHINSON.

By the terms of the will the estate to serve the uses was to arise, first, when *John Warter* should attain twenty-one. He has not attained twenty-one. That event, therefore, has failed. Secondly, it was to arise when *Henry Warter* should attain twenty-one, and that event has happened. The case of *Goodtitle v. Whitby* (b) is not applicable to the case before the Court. That case and other cases of the like nature establish the general principle, that a gift during minority, with remainder to arise at the end of that period, and when the prior gift is to determine as well by death as by minority, confers a vested remainder. Here the estate of the trustees was not to determine by the death of *John Warter* under twenty-one, for if he died under twenty-one, the estate was to continue till *Henry* attained twenty-one, and if *Henry* died under twenty-one, it was to continue until *Margaretta* attained twenty-one. That peculiarity distinguishes this case from all former cases on the subject. *John Warter* therefore did not take a vested remainder; he could not have any vested interest before the trustees took a seisin to

(a) *Ambl. 558.*

(b) *1 Burr. 228.*

1823.

WARTER
against
HUTCHINSON.

supply the uses, and they were not to take such action in the lifetime of *John*, while he was under twenty-one. They must have had the legal fee as devisees to uses before the uses could be executed by the statute. Even if *John* had died under twenty-one, without leaving issue, *Henry* could not have been in possession for his life, by virtue of the gifts in this will, while he was a minor, because, from a preceding part of the will, the intention of the testator is clear both by the language he has used and the purpose he has declared, that the estate which he had previously given to the trustees and their heirs, until, &c. should, notwithstanding *John's* death in his minority, continue, for the purposes expressed with respect to *Henry*, and as a fund for the payment of debts and legacies: and it is a circumstance in favour of the argument that the gifts were contingent, that the estate of the daughter must have been suspended until twenty-one, for the intermediate rents are not given to her.

There is nothing in the will to shew that in the event of *John Warter's* having a son or daughter, the fee to serve the uses should arise for the benefit of the son or daughter. This was a question in the case, and material, because, although a daughter was born and survived the father, and is now dead (a), still if she had a vested interest, the rents and profits would for her time belong to her personal representatives; however, *John* did not take any estate, because he died under twenty-one, and the daughter did not take any estate, because her father died under that age. Now, although the words of the will, as they

(a) It was stated by counsel that *J. W.'s* daughter had died pending the suit.

1823.

 WATTS
 against
 HUTCHINSON.

respect the seisin of the trustees from the time at which the seisin was to arise, may, of themselves, be sufficient to give the daughter a 'vested' interest, yet it appears from the context and plan of the will, that it was the intention of the testator that she should not have such vested interest on the death of her father *John* before he attained the age of twenty-one. The testator was making a provision for *John*, and for his maintenance, and for the accumulations. The intention was, that if *John* died under twenty-one, *Henry* should, while under twenty-one, be entitled to the rents and profits for his maintenance, and to the accumulations, he being also a legatee of those accumulations in the event of *John's* attaining twenty-one. Taking these two clauses together, and comparing them with that gift to the trustees under which the uses are to arise, the intention of the testator is manifest, that all the interest intended for *John* and his family should cease from the moment at which he died under twenty-one. If that were not the plan of the testator, this consequence would follow. The existence of a daughter of *John* would have excluded *Henry* from a right to maintenance, and from the benefit of the accumulations, and still the daughter would not have been entitled to them. She could not take them because the seisin of the devisees to serve the uses was not to arise until *Henry* attained twenty-one, and consequently there must, in the mean time, have been a suspension of ownership. The testator must have intended, that if *John* died under twenty-one, *Henry* should, from the moment of his death, become entitled to the rents, and if *Henry* died under twenty-one, that *Margaretta* should become entitled to these rents, and that the estate for life should vest only

1893

Will
against
Hobbs.

at twenty-one. Although this might be an improbable intention, diametrically as if John had attained twenty-one, his first and chief son was to take successively in tail male, with remainder to the daughters in tail male, still it is the only intention to be collected from the language of the will. There is not any expression in the will from which it can be collected, that a son or daughter of John should take in case John died under twenty-one; but there is an express provision, that Henry should take the rents, and consequently have the rights of himself and family accelerated as soon as John died under twenty-one. Therefore, as the daughter would not have taken any benefit while Henry was under twenty-one if John had died under twenty-one, it follows from the context and plan of the will, that the daughter was excluded by her father's death under twenty-one; otherwise this absurdity would follow; the daughter's right would depend entirely on the contingency of Henry's attaining twenty-one, and that contingency was to be for his advantage, for he was then to become the owner; as the event has happened, his attaining twenty-one would, by a different construction of the will, have the effect of completing, not of excluding her title. If this had been a gift to John and his heirs, determinable on John's death under twenty-one, it is quite clear that John and all his descendants would, by his death under twenty-one, have been excluded; and the object of the gift might be to exclude the issue of those who should marry under twenty-one, and the language of the will corresponds with and may effectuate that intention.

Assuming that the trustees took only a chattel interest distinct from a seisin to serve the uses, then as John died under twenty-one, they never took an

created for his life, and his daughter never took any vested interest, and Henry, all the events which have happened, has taken no estate for his life. If the trustees took in the first instance an absolute legal fee, the consequence would be, that the beneficial devisees would have mere equitable interests; but if the trustees took only a chattel interest, then the legal fee would only supply a seisin to the uses when either of the three persons attained twenty-one. It is quite clear, that by the intention the chattel interest was to continue distinct, and for a distinct purpose, viz. for the purpose of maintenance, paying the debts, and raising the portions. There is not any intention that the fee of the trustees should arise until John or Henry, or the daughter, should attain twenty-one. This is evident from the context of the will. Had the gift been to the trustees and their heirs, for certain purposes confined to John alone, then it may be conceded, that under such a gift to trustees during minority, and afterwards to them in fee on his attaining twenty-one, the fee would, on the authority of *Boraston's case* (a) and *Goodtitle v. Whitty* (b), have been a vested interest. But that is not the nature of this gift, because John's estate is only to arise on one of three events, and not at all events. Every vested remainder is an estate which exists at all events, but an estate to arise on one of three events, is not an estate to exist at all events. [*Bagley J.* Supposing the limitation had been to the trustees until John should attain twenty-one; and on John's attaining twenty-one, then to him, with remainder to his first and other sons, with remainder to his daughter in tail

1822.

WATTS
against
HUTCHINSON.

(a) 3 Rep. 19.

(b) 1 Burr. 228.

1884.

WATTS
against
HODGSON.

general, and John had died under twenty-one? [John would have had a vested remainder, but if it could be shewn that Henry was to interpose, and he was to take in case John died under twenty-one, then the same difficulty as exists in this case would arise. (Brydell). Suppose the gift had been to trustees till John had attained twenty-one and on John's attaining twenty-one then to him for life, with remainder to his first and other sons, but if John died under twenty-one, then to trustees until Henry should attain twenty-one, then to the first and other sons of Henry, in tail male?] That would be a contingent interest. A gift during minority is a gift which is to determine at all events by death, and a gift over, on the determination of that estate, must be a vested remainder; but if any other event is connected with that circumstance, so that the ownership may be suspended, the interest is not a vested remainder, because there may be an interval, during which there may not be any ownership, while, if the estate or interest be vested, no such interval can exist.

Hodgson, contra, made two points. First, the trustees took an estate in fee simple, or a power to sell or to mortgage the fee simple, or at least to charge any portion of that fee simple for the purpose of executing any of the trusts reposed in them. Secondly, if they did not take the fee they took a particular estate, capable of being the foundation of a remainder, and not a fee determinable upon a particular event.

The testator, in the first instance, directs his funeral expenses and debts to be paid by the trustees and executors; and for that purpose he charges his real estate. But, although a mere charge might secure the payment of

the debts, it would not do so by the agency of the trustees which is the declared intention of the testator. Therefore, in order to raise money for the payment of debts, the trustees must have taken the legal fee. If they did not take the fee, they only took an estate determinable upon a minor's attaining his full age, which would not be an estate upon which money could be raised by mortgage, which is the particular mode pointed out by the testator. The testator next proceeds to devise his estates to the trustees, their heirs and assigns, to the uses, upon the trusts, and for the purposes thereafter mentioned. The trustees, therefore, were to take the fee for the purpose of executing the trusts, as well as serving the uses afterwards created. Then, after giving two annuities, he devises his estates to the trustees until *John Warter* should attain the age of twenty-one years; and if he should die in the meantime, until *Henry Warter* should attain twenty-one; or if he should die in the meantime, until *Margaretta Warter* should attain twenty-one; upon trust, that they should raise, out of the rents and profits of the estate, or by the sale or mortgage thereof, money sufficient to pay debts and funeral expenses. They are further directed to raise, by sale or mortgage out of the estate, two legacies of 100*l.* to the executors; another of 2000*l.* to *Henry Warter*; and in the event of the testator's sister having other children, 3000*l.* In order to enable them to raise these charges, they must have taken the fee. The case of *Doe v. Simpson (a)* is distinguishable from the present case, because there the trustees had not the power to raise money by sale or mortgage.

1828.

 WARTER
 against
 HUTCHINSON.

(a) 5 East, 162.

Secondly,

1886:

WATTS
against
HUTCHINSON.

Secondly, assuming that the trustees did not take a fee simple, they took in particular estate, and then John Watts took a vested estate for life, and then the trustees devised his lands to A. and his wife for eight years, and after that term, to remain in the testator's executors, which such time as A. should accomplish his age of twenty-one years, and when A. should come to that age, then the testator willed that A. was to enjoy the lands to him and his heirs for ever. It was held, that A. took a vested remainder, expectant on the particular estate to A. and his wife and to the executors, and that estate was held to be a chattel interest, determinable either when A. attained twenty-one years, or when he died under twenty-one years, which event happened. In *Mills v. Dugard* (b), there was a devise to the testator's wife till his son should attain twenty-one years, and when he should attain that age, then to the son and his heirs. The son died at the age of thirteen years; and it was held by Lord Hardwicke that the wife's estate determined upon his decease, and that the remainder vested in the son on the testator's death, and did not expect the contingency of his attaining twenty-one. The decision was, that the particular estate determined on the death of the son under twenty-one, and therefore that that estate was a chattel interest. [*Bayley J. Doe v. Underdown*, *Willes*, 208., is also in point.] *Goodale v. Whitby* (c), and *Doe v. Lea* (d), are authorities to the same effect, only with one difference, very material to this case. In the two latter cases the devise was to trustees and their heirs; and yet it was held that they took only a chattel

(a) 3 Co. 19.

(b) 1 Eq. Ca. Abr. 195.

(c) 1 Burr. 222.

(d) 3 T. R. 41.

interest.

1822.

WALTER
against
HUTCHINSON,

interest. In *Stanley v. Stanley* (a) also the devise was to trustees and their heirs in trust, to receive the rents until *A.* should attain twenty-one, and immediately after he should attain twenty-one, to convey to the use of *A.* for life; and from and after the determination of that estate, by forfeiture or otherwise, in his lifetime, to trustees and their heirs during his life, upon trust to preserve the contingent uses; and after his decease to the use of his first and other sons in tail male, and for default of such issue, or in case of the death of *A.* before twenty-one, upon a similar trust to other persons. Sir *W. Grant* held that *A.* took a vested remainder for life, and that the trustees took an estate for so many years as his minority might last. That case also is an authority to show that the estate of the trustees may be a chattel interest, although it be limited to them and their heirs, and that the subsequent remainder is vested. In all these cases an estate has been given to fill up the measure of time, until the devisees beneficially interested should attain the age of twenty-one years, and yet it has been held that the attainment of that age was no condition precedent, but merely denoted the time when the former estate was to determine, and the remainder was to vest in possession. In *Bromfield v. Crowder* (b), the testator devised all his real estate to his wife for life; and after her decease, unto *A. B.*, his heirs and assigns for ever. Afterwards, by a codicil, he revoked the devise to *A. B.*, and gave him instead his estate during his natural life, in case he survived the testator's wife. And at the decease of his wife, or of *A. B.*, or of the longest liver of them, he gave all his real estate to *C. D.*, if he, *C. D.*, should live to attain the age of twenty-one years; but

(a) 16 Ves. 491. (b) 1 Bos. & Pull. N. B. 312.

1832.

Warrick
against
Hoschmann.

in case he died before he attained that age, and his brother E. F. should survive him, he gave his real estate to E. F. if he lived to attain the age of twenty-one years, but not otherwise. The testator's wife and H. B. died while C. D. was under the age of twenty-one, and it was held that C. D. took a vested estate in fee simple, determinable upon the contingency of his dying under the age of twenty-one years. This case is an authority to shew, that even where the contingency cannot be referred to the determination of a preceding estate, as, an estate given to A. in case he should attain twenty-one, without reference to any prior estate, is not given on a precedent condition. The inclination of the Court in all these cases has been strong to vest the estate in the object of the testator's bounty. Now, that the intention of the testator was to vest the estate in *John Warter* is very apparent upon this will. For this purpose we must look to the subsequent part of the will, apparently the most important in the testator's mind, in which he disposes of the estate subject to the purposes for which he has created the previous trust. That clause is, "and when and as soon as the said *John Warter* shall attain the age of twenty-one years, or in case of his death, when and as soon as the said *Henry Warter* shall arrive at that age, or in case of his death, when and as soon as my niece *Margaretta Warter* shall arrive at the age of twenty-one years, I give and devise my said lands, subject as aforesaid to the said trustees, their heirs and assigns, to the use and behoof of my nephew *John Warter*, and his assigns, for the term of his natural life." Now, if this clause be taken literally, it shews clearly that it was the intention of the testator to vest the estate in *John Warter*. The attainment of twenty-one by *Henry Warter*, or by

Margaretta

1822.

 WARRIN
 against
 HANCOCK

Margaretta, was an event entirely unimportant unless *John* had died under twenty-one, and was not to mark the determination of the estate of the trustees, except in that event, and yet he gives *John* a life estate in case either of the other parties attained twenty-one; and if it should be held, that because *John* died under twenty-one, *Henry's* estate became the first estate in possession, and is to be followed immediately by the remainders to *Henry's* children; the consequence will be, that all the limitations to *John's* children (the very first objects of the testator's consideration) must fail. This could not be the intention; but the consequence can only be prevented by holding (in the construction of this particular clause) that the testator having previously given an estate to the trustees during a time or term, depending on several contingencies, is, in this clause, doing no more than saying what was to be done after the determination of that estate; and it is well settled by the cases already cited, that the adverbs of time, "as" and "when," and "in case," mean no more than, from and after the determination of the preceding estate. Much stress has been laid on the clause by which the testator gives a maintenance to *John*, and if he should die under twenty-one, to *Henry*. This is pressed upon the Court as materially affecting the construction of the devise to both brothers. But, in truth, this is no part of the devise at all, but is merely a part of the declaration of the trusts and purposes to which the trustees were to apply the rents during the continuance of the estate given to them, and can only be urged in arguing on the devise as affording an inference. But assuming that the Court should hold, that this created a subsequent condition which would defeat the estate of *John*, still it would not

and defeat

1893.

WINTER
against
HUTCHINSON.

defeat the estate of the issue. *Latham v. Tracy* (a), as it has been generally understood, and is stated by *Ferne* (b) (though perhaps erroneously (c)), is an authority for this. For, as that case has hitherto been considered (without entering into the error imputed to Lord Hardwicke (d), of holding that, after what he considered to be a determinable fee, there might be vested limitations), it has been admitted to establish the proposition, that the operation of the condition which related to Sir Henry Neltherpe's attaining the age of

(a) 3 Atk. 774. Amb. 504.

(b) But. *Ferne*, 225.

(c) On a careful examination of this case, it appears probable that *Ferne*, and some other writers who have discussed it, have been misled, by the inaccuracy and want of perspicuity observable both in Atk. and Amb.'s reports of it, into an important mistake. *Ferne*, it is clear, and his learned editors, consider Lord Hardwicke, in speaking of the contingency that did not affect the subsequent limitations, to speak of the contingency of Sir H. N.'s not attaining the age of twenty-one, whereas it rather appears, not only from the context of the judgment, but also from the nature of the proceeding in which that case came on, that his Lordship referred throughout to the previous contingency in the will, "in case the testator's daughter should die without issue living at her decease." His judgment being that that contingency related only to her death without issue during the minority of Sir H. N. (see 3 Atk. 795. and *Ld. Kenyon's Rep. by Ham. Mer.* 563, and did not affect the ulterior limitations. As to the proposition imputed to Lord Hardwicke, that there might be a determinable fee and a subsequent vested limitation, there is plainly some inaccuracy about it; for Ambler, in p. 208, makes his Lordship say, "All the limitations of the test estate devised new legal limitations, except the estate interest in the trustees during Sir H. Neltherpe's minority;" and in p. 204, "the remainder to the trustees during the minority of Sir Henry Neltherpe is a determinable fee." Lord Hardwicke could not have intentionally contradicted these expressions; and, as the limitation during Sir H. N.'s minority failed altogether, it is not likely that his Lordship intended to give it any character that could bring into doubt an established principle. It is not possible that he really considered it a chattel interest according to Atk.'s first reports; and, in that view, this case will belong to the same class with *Dec v. Whitty* and *Dec v. Lea*.

(d) See Butler's Note (a) on *Ferne*, 225. 1 Pres. on *Estate*, (2d ed.) 496.

1823.

WATERS
against
HUTCHINSON.

twenty-one, affected only his estate, without defeating or impeaching those estates which were limited to his issue, and afterwards to the *Lethbriers* by way of remainder after his death. In *Stanley v. Stanley*, Sir *W. Grant* was of the same opinion, that a subsequent condition applying to an estate for life does not necessarily defeat the subsequent estate. Here, too, there is a limitation to the trustees to preserve contingent remainders; so that no reason can be assigned why the estate of the infant daughter should not be a vested estate, even if the estate of her father was to determine on the condition subsequent, or not to arise on the condition precedent of his attaining twenty-one. Besides, here the Court, in furtherance of the general intention, might imply the words "without issue." In *Jenkins v. Herries* (a) there was a devise over after a preceding limitation, in case the devisee should die in the life-time of a third person: and the *Vice Chancellor* held; that in that case they might imply the words "without issue," it being the general intention of the testator that the issue of that person should take, notwithstanding he died in the life-time of the third person. That case was decided on the authority of *Spalding v. Spalding*. (b) There the devise was to the eldest son *John*, and to the heirs of his body after the death of the testator's wife, and if the eldest son died during her life, then his son *William* was to be the heir. Other lands were devised to his son *Thomas* and the heirs of his body, and if he died without issue, then *John* was to be his heir. And he devised other lands to *William* and the heirs of his body, and if all his sons died without heirs of their

(a) 4 *Madlock*, 67.(b) *Cro. Car.* 185.

bodies,

1811.
~~1811.~~
 1811.
 1811.

bodies, then his lands should go to the children of his brother. The eldest son died, leaving a son, ^{at} the life-time of the testator's wife, and William entered upon the son of John. It was held by the Court, upon the whole content of the will, construed according to the intention of the party, that the construction should be, that if John died without issue, living ~~and~~, that then William his youngest son should have the estate. That case would have been much stronger, if instead of the gift being to the eldest son and the heirs of his body, it had been to him and his first and other sons; and if he died in the lifetime of the wife, then over. In that case it would have been clear, that there could have been no intention to deprive the issue of their estate. In this case there is a set of limitations, which clearly shew that the testator intended that his nephews and their families in succession should be the principal objects of his bounty, and there is nothing to oppose to this but an inaccurate expression in declaring a trust, probably intended as a mere resulting trust for the benefit of the person entitled to the freehold; but, in any rate, only the trust of a particular estate, intended to precede those limitations, and totally unconnected with them.

Preston in reply. In *Jenkins v. Harries* the House of Lords have reversed the order of the Court of Chancery, and intimated that the title is so doubtful that no purchaser ought to be compelled to take it. As to the case of an estate to A. and the heirs of his body, and if ~~it is under twenty-one years~~, then to B, this is a vested estate tail with a contingent remainder, and B.

could

could only take in the event of *A*'s death under twenty-one years.

The argument for the defendant assumes, that *Henry* and also *Margaretta* would be excluded from the possession merely because *John*, though dying under twenty-one, had left issue. The uses of the legal estate, if to vest immediately, are totally incompatible with the general provisions of this will. When the testator has given express estates, they cannot be enlarged by implication; and in the case of *Doe v. Simpson*, the Court did not enlarge the estate; it only gave that measure which was equal to the quantity of trust which was created. If I give to *B.* and *C.* as trustees, without an estate to them, and I create trusts or purposes which require that they should have the fee, then, in the absence of express or declared intention, they take the fee by implication. But if an estate be given to trustees and the heirs of their bodies, this would be a great blunder, but the Court could not by construction enlarge that express estate. It is impossible to have an estate contrary to the limitations in the will. *Stanley v. Stanley* (a) decides that point; and it also decides that a proviso which was to defeat the estate of the tenant for life, did not defeat the gifts to his first and other sons. If you give to trustees upon trust to convey a fee, they must have the legal estate in fee for that purpose; and no Court can cut it down. In *Barastan's case*, and all the cases of that class, a particular interest was given, with an ulterior interest when a period, as distinguished from an event, should arise, on which the former interest was to determine. That is instantly a vested estate, capable

(a) 16 Ves. 491.

1823.

WILLIAMS

Horseshoe

Horseshoe

of being in possession immediately, if the possession were vacant by forfeiture or any other means. In this case, the trustees have no further interest after *John* should have attained twenty-one, since by his death during his minority there is a declared purpose to be performed for *Henry*. Unless *John*, though a minor, could have entered, supposing the trustees to have had a vested interest, and to have committed a forfeiture, his interest was not vested. The answer would be, that the time for his possession had not arrived; that he was under twenty-one, and that he was not to have any vested estate until he arrived at twenty-one; that if he died under twenty-one *Henry* was to take. Under these circumstances, his interest was contingent. This being a case of gift to trustees and their heirs, "until, &c." it cannot be construed to be an estate to trustees and their heirs absolutely and for ever. It is evident their first estate was a limited or particular estate, because a new estate is to arise to them when an event, which is to be a determination of the former estate, shall happen. The decision in the case of *Spalding v. Spalding* was quite right; because a previous estate tail was given, and the Court would not presume an intention to determine that estate on the contingency which was expressed. The second gift was of a contingent remainder after a previous estate tail; and, therefore, by the nature of the limitations, and by the rules of law, the words "without issue" might be implied, because they were consistent with the nature of the two interests. To have decided otherwise would have established that the testator was giving by executory devise, and not by way of remainder. This case may be compared to a grant or devise to *A*, when he attains twenty-one years, and that

IN THE FOURTH YEAR OF GEORGE IV.

is a contingent interest. It is only in those cases in which there is a preceding gift, and the Court can see that the word "when" only denotes the time at which the remainder shall take effect in possession after the determination of the prior estate that the remainder is vested. So that the prior gift must fill up the exact time which is to precede the remainder. To say that the trustees took the fee-simple, is contrary to the language of the will; and to say, that they have an immediate estate in fee, is to reject the words of contingency. If an express estate be limited, though improper for the purposes of the trust, that estate cannot be made larger merely because the testator ought to have given a larger interest. If the testator give a chattel interest on trust to sell or to mortgage, the trustees can only sell or mortgage the chattel interest. If a testator gives an estate for years only, the course is to apply to parliament to obtain the fee for the purposes of sale. But a court of law cannot by construction change the express estate. Supposing *John* and *Henry* had both died without issue, leaving *Margaretta* the daughter to be the first taker, how is the estate to be then vested? There is not any interest to fill up the measure of the intermediate time till she shall be adult. This circumstance is an answer to every one of the authorities. There is not any quantity of interest commensurate to her minority. Or, suppose *John* and *Henry* both died under twenty-one, and their issue to be excluded, or their interest determined, there is a remainder in favour of the daughter, who is then to become tenant for life; there is not any estate to fill up that intermediate space of time; and yet, if the argument be right, the estate to the trustees would never arise until

347
828
1825
HUTCHINSON.

1821
1823.

Wm. W. W.
Hutchinson.

Margaretta attained twenty-one. In *Bromfield v. Crowder*, if the testator had stopped at the gift to the first taker, the gift would have been contingent; but, looking at the other gift, it appeared that the first gift was vested immediately subject to be divested in that event.

The first devise, as a substantive gift, would have been on a contingency. In the present case, the contingency is in the body of the gift, and there is not any way of reconciling the language except by adopting the contingency. If the testator had said, "from and after the time that *John* shall attain twenty-one, to *John*," then, because *John* was at twenty-one to have possession, it might mean, as to him, from and after the determination of the prior estate, so as to be vested. But when the testator has said, "or if *Henry* shall attain twenty-one," there arises the difficulty what he could mean as to *Henry* arriving at twenty-one, except it was to provide that the trustees should not, if *John* were dead under twenty-one take until *Henry* attained that age. That is a contingency. It is objected that this is to defeat an estate already given. *Spalding v. Spalding* is relied on against that consequence; but that case is not applicable. In this case the testator was, in the preceding part of the will, employed on the ancillary trusts. When the testator made the provision for the younger children he acted on the first estate only. To the second gift he annexes a contingency, and does not first make a gift and then defeat it. In *Spalding v. Spalding*, the interest to *B.* was given by way of remainder; and the word "issue" remains part of the gift, and the right of the issue cannot be defeated without express words. Hence the implication that *B.* was only to take on the event as connected with the failure of issue. *Lethuelier v.*

Tracey,

Tacey, in whatever way it is considered, it is decidedly with the plaintiff. There is an admission by Lord *Hardwick* that there was a fee determinable, and that the contingency was confined to one interest, and that the ulterior gifts were in suspense only while that fee continued. (a)

There are other cases in which a contingency may extend to all the gifts. In *Doe v. Shippard* (b), a devise was to *A.* for life, with remainder to *B.* in tail, and from and after the determination of that estate, then to the uses thereafter mentioned, and then the testator gave various remainders; and it was decided, on the introductory clause, that every subsequent gift was controlled by the contingency. In *Brownword v. Edwards* (c), the estate was to commence on the contingency, because the party was to take only in case he attained twenty-one, and the issue were excluded because he did not attain the given age. [Bayley J. In *Doe v. Shippard*, in case his daughter survived her husband, the testator created a variety of limitations, and the Court considered that as being a conditional devise, because they said the testator might have an object: he might wish to prevent her providing for her after-born children by another husband.] A contingency annexed to a particular estate, for reasons connected only with that estate, never could be carried on to the remainder; but whenever the Court can see that the contingency applies to all the gifts and interests, then all must be contingent. Under a devise to *A.* and his heirs; and if he die under twenty-one, then to *B.* for life, with remainder over on his death; every interest

(a) 3 Atk. 774. (b) Doug. 75. (c) 2 Ves. sen. 243.

1848.

Warner
against

Meredith

after the gift to *A.* is contingent; and this case is in the context of the like description.

The following certificate was afterwards sent:

This case has been argued before us, and we are of opinion, that *Brownlow Yorke, Richard Lloyd, and John Hutchinson*, took only a chattel interest in the estates devised to them.

We think that, on the death of the testator, *John Richard Meredith Warner* took a vested estate for life.

We think that *Margaretta Elizabeth Meredith Warner*, the infant, took an estate in tail male on the death of her father.

We think that *Henry Warner* took, at the testator's death, a vested estate for life, in remainder, expectant on the death of his brother *John Richard Meredith Warner*, and failure of sons and daughters to be born to *John Richard Meredith Warner*, and issue male of such sons and daughters.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

W. D. BEST.

DAWS against BENN and CRESSWELL.

THIS was an issue directed to be tried in this Court, by a decretal order of the Master of the Rolls, to try whether the plaintiff, *William Daws*, was entitled to the tithe of seed tares growing, arising, and renewing, and which were had and taken by the defendant, *Edward Benn*, on and from the lands in his occupation, situate in the hamlet of *Hatton*, in the parish of *Bedfont*, in the county of *Middlesex*, in the several years 1813 and 1814. At the trial of the cause before *ABBOTT C. J.* at the *Westminster* sittings after *Hilary* term, 1822, a verdict was found for the plaintiff in the affirmative of the words of the above issue with nominal damages, subject to the opinion of the Court on the following case. The parish of *East Bedfont*, in the county of *Middlesex*, consists of two rectories, the one called the rectory of *East Bedfont*, the other called the rectory of *Hatton*. By letters patent, bearing date the 14th day of *September*, in the 41st year of the reign of *Queen Elizabeth*, the said queen granted in fee to *Henry Best* and *Robert Holland*, among other things. "Necnon omnes illas decimas nostras garbarum et granorum annuatim et de tempore in tempus crescentium, provenientium, seu renovantium in *Hatton*, infra parochiam de *Bedfont*, in

On the dissolution of a religious house, the rectory of *H.* became vested in the crown. *Queen Eliz.*, by letter patent, granted to *A.* and *B.* "omnes decimas nostras garbarum et granorum in *H.*" On an issue between the grantees and the vicar to try the right to the tithe of seed-tares, it was proved that the former had always received it, and that the vicar had received all that were considered small tithes, the tithe of tares cut green, and of hay. No endowment was produced. It appeared in evidence, that the tithe in question was claimed and paid as a great or rector's tithe: Held, first, that under the grant of

Queen Eliz. every thing passed that was before vested in the crown, and that the grantees stood in the situation of rector. Secondly, that the tithe in question was a tithe garbarum. Thirdly, that it was a great tithe. Fourthly, that the presumed endowment of the vicar must be limited by perception, and that, never having received this tithe, he could not establish a right to it, whether it was great or small.

1811.

DAVE
BENN
BENN

predicto contractu *Mitallan*; habendum, tenendum, et gaudendum; prefato *Mortuo Besset* *Robert Holland* et heredibus et assignatis suis. The property in the said tithes has descended to, and is now vested in the present lay impropriators thereof, and the plaintiff during the time in question was lessee under them, of all and every the tithes of corn and grain, and all other heretorial or great tithes whatsoever yearly, and from time to time coming, growing, arising, happening, renewing, increasing, or to come, &c. in, upon, or out of all the lands and grounds within the said hamlet of *Hatton*.

The defendant, *Edward Benn*, became the occupier of a farm in the said hamlet and rectory of *Hatton* at the latter end of the year 1811, and continued to occupy it during the years 1812, 1813, and 1814; and the defendant, *Henry Whitfield Cresswell*, is the executor of the late Dr. *Whitfield*, who, during those years, and for many years preceding, was the vicar of the said parish of *East Bedford*. As far back as living memory extends, tithes have been grown in the hamlet and rectory of *Hatton*, and upon the farm occupied by the defendant, *Edward Benn*. If cut green, the tithe was rendered or compounded for to the vicar. If suffered to stand till ripe, the tithe was yielded or compounded for to the lay impropriator or his lessee from time to time; and the defendant *Benn*, in the year 1812, rendered the tithe of seed-tithes to the plaintiff, but in the years in question, the said defendant *Benn* refused to render such tithe, upon the ground that the same was a small tithe, and therefore payable to the vicar. Three witnesses were examined who proved this usage; one of them was of the age of eighty-six, and another of fifty-six, and both these

these persons said that seed-tares were considered a great or rector's tithe. The third, who was the plaintiff's son, and who had actually received the tithe of the defendant *Boss* as before mentioned, said, they claimed them as a great tithe. (Tares when once cut, do not spring up again like clover; if cut green they are given as fodder to cattle, if suffered to stand till ripe, they are then cut and laid in wads unbound like beans and peas, and are carried home and thrashed in the barn like barley, oats, peas and beans. After thrashing, the stalks are used for foddering cattle like the straw of oats, and the seed usually given as food to pigs and pigeons. Tares thus harvested, are called seed-tares. No endowment of the vicarage was proved. It appeared in evidence that the vicar had enjoyed the tithe of hay, and was considered to be entitled thereto. The vicar had always received, and was admitted to be entitled to all the small tithes with the exception of the tithe of seed-tares, if the Court should be of opinion that such tithe is a small tithe; the right to the tithe of such tares being for the consideration of the Court under all the circumstances of the case. The case was now argued by

Wilde for the plaintiff. The first question to be considered, is the relative situation of the parties. The plaintiff is lessee of the rector, and the defendant *Benn* has paid the tithe to the vicar, whose representative (he having died during this suit) is also a defendant. The question then is to be decided as between rector and vicar. The rector has a common law right to all tithes, and they cannot be taken from him except by endowment, or by prescription, which raises the presumption of an endowment.

CASES IN EASTER TERM

1888

1888
1888
1888

ment, *Audrey v. Smalcomb* (d), *Garnons v. Barnard* (b), *Sims v. Bennett*. (c) Now it is an invariable rule of construction, that the endowment of a vicar must be construed by usage, *Carr v. Heddon* (d), *Munby v. Curtis* (e) The rector having originally the power to grant or retain whatever he pleases, the question as to all endowments must be what was intended to pass, and the usage best shews what that intention was. Even then, if it is to be assumed in this case that the vicar was endowed of all small tithes, because he has, generally speaking, received them, it still remains to be determined what, at the time of making the endowment, were considered small tithes, for those only could have been in the contemplation of the parties, and consequently no others could pass. There is neither case or dictum to shew, that at the time when the endowment must be supposed to have been made, the tithe in question was considered a small tithe, and as tares have from time immemorial been well known as a titheable matter (f), this is distinguishable from those cases where seeds of modern introduction have been held small tithes and to belong to the vicar, although they could not pass by the original endowment, not being then known. This case must be decided upon the opinion as to the nature of the tithe which prevailed when the endowment was made, not upon that which may now be entertained. *Lord Coke in 2 Inst.* (g) put *Xizania* (tares) as a known example of great tithes, and that is not

(a) 4 Gw. 1222.

(b) *Ib.* 1462.

(c) 3 Gw. 874.

(d) 1 Bro. P. C. 100.

4 Wood, 315. 3 Gw. 1258. S. C.

(e) 2 Price, 284.

(f) See *Perry v. Soam, Cro. Elia.* 138.

(g) P. 649.

merely

merely his dictum, but is founded on a resolution of the Court of Common Pleas. *Stears v. Brazier* (a), *Hodgson v. Smith* (b); and *Sims v. Bennett*, are to the same effect; and in *Wallis v. Pate* (c), *Comyn, C. B.* says, that vetches are a great tithe, if mowed or cut when ripe. It is to be observed, that the question here is not merely as to the seed of tares, but seed-tares, which mean tares cut when ripe and harvested. Besides the cases determined as to seeds, are distinguishable on the ground before mentioned; but tares are not a seed, they are a species of pea and grow in pods. *Burn*, in his *Ecclesiastical Law* (d), ranks tares amongst other sorts of grain, and they appear to have been so considered in *Wall v. Fullwood*. (e). Tares then have been cultivated from time immemorial, and the tithe of them at the time of the endowment had acquired the character of a great tithe, and that must be the guide of the Court to the intention of the parties. Upon this view of the case it is immaterial whether the tithe of tares falls within the words *decimæ garbarum et granorum*; but there are authorities to shew that it does. There is no doubt that tares might be bound, and probably were so in former times, and then *Sims v. Bennett* is expressly in point. *Cowell's Interpreter*, *Charta de forresta*, *Sheppard's Abridgment*, part 2., *Terms of the Law*, p. 365., and *Lindwood*, in many passages of his *Commentary on the Constitution of Archbishop Stratford*, "de decimis," all shew how large a meaning the word *garba* may have, and here the usage warrants it. In *Barsdale v. Smith* (f) it was held,

1829.

DARKI
against
BANK

(a) 2 Wood, 378. 2 Gw. 742. S. C.

(b) 2 Wood, 21.

(c) 2 Cdm. 663.

(d) F. 3. p. 460.

(e) 1 Com. 330.

(f) Cro. Eliz. 658.

that

1893]

D. & C.
Appellate
Bank

that it included tithes; (and in *Oglander v. Pomfret* (a), *Eyre* L.J. observed that *grange* was a term of which the meaning might be narrowed or enlarged by usage. Therefore, construing the words of the grant, either with reference to their ancient and original meaning, or to the custom which has prevailed in this parish, it is plain that the tithes of tithes might be conveyed by them; and as in fact those claiming under the crown have always received this tithes, there can be no doubt that it was meant to be included in the grant, and that it was not included in the endowment of the vicar.

Cresswell, contra. The claim of the plaintiff must depend upon one of two grounds; either that being in the situation of rector he is entitled to all tithes, unless the vicar can shew an adverse right; or, secondly, that as grantee of the tithes *garbarum et granorum*, he is entitled to the tithes in question. The plaintiff's lessor is not, however, rector, but merely grantee of certain tithes, and must make out a strict right to the tithes which he claims, otherwise he cannot recover, even though the vicar may not be entitled to them. *Charlton v. Charlton* (b), *Ferrars v. Pellatt* (c), per *Graham B.* in *Byam v. Booth* (d), *Rose v. Callaud* (e); for the rectory and those rectorial tithes which are not included in the grant, still remain in the crown, *Kennicott v. Watson* (f). If, however, the plaintiff is to be considered as rector, still, as the vicar has received all tithes considered small, that raises a presumption that he is endowed of all small

(a) 3 G. 1244.

(c) 4 G. 1602.

(e) 5 F. 186.

(b) 2 G. 715. *Dunb.* 225. S. C.

(d) 2 Price, 266.

(f) 2 Price, 260.

tithes. *Cartwright v. Bailey* (a); *Rhye v. Poullett* (b), *Kemhron v. Watson*. The payment of any small tithe having been paid to the rector does not bar the vicar's claim, if that payment can be attributed to a mistake. *Howley v. Venables* (c), *Watkins v. Baxter* (d), *Clarke v. Sturges* (e), *Jeremy v. Stangorhays* (f), *Hicar v. Kilington* (g), *Tyrie v. Coll. Cambridge* (g), *Hunt v. Codrington* (h); *Dormer v. Curry* (i). Here it is quite clear that the tithe was paid to the rector under the notion of its being a great tithe, for both the witnesses who paid and those who received it, considered it a great tithe; and in *Garnons v. Barnard* (k), such evidence was considered sufficient to prove what, in the particular parish, was considered to be the nature of the tithe for which the payment then in question was made. If then the tithe of seed tares be a small tithe, the defendants (considering the question as between rector and vicar) are entitled to the judgment of the Court. It is now distinctly understood that the nature of the tithe depends upon the nature of the thing, and not upon the quantity produced, or the use to which it is applied. *Uvedal v. Tindal* (l), *Smyth v. Wyatt* (m), *Wallis v. Pain*, *Sims v. Bennett*. Now seed tares, in nature, rather resemble those seeds which have been determined to be small tithes, than corn or grain, which are held to be great tithes. Cole-seed, saintfoin-seed, and rape-seed, have all been determined to be small tithes. *Pisk v. Wimberly* (n), *Howley v. Venables* (o), *Brewick v.*

1803:

 Bact
against
Bact

(a) 3 Gw. 938.

(b) *Ib.* 1175.

(c) 3 Wood, 207.

(d) 4 Wood, 303.

(e) 3 Gw. 926.

(f) *Ib.* 1247.

(g) 1 Will. 170.

(h) 2 Gw. 564.

(i) 4 Price, 115.

(k) 4 Gw. 1465, 1479.

(l) Cru. Car. 28.

(m) 2 Atk. 364.

(n) 2 Gw. 533.

(o) 3 Wood, 146.

1825.

D.W.
H.W.

Nichols: (a) Clover-seed, also, is a small tithe, *Wallis v. Pain*, and that in its nature closely resembles seed tares, for clover is an artificial grass, and tares also are used as a substitute for hay. It is supposed that a distinction exists between the seed of things newly introduced and of those which have been immemorially cultivated in this country; but in *Wallis v. Pain*, Comyn C. B. says, that by the common law all seeds have been considered small tithes, as long as the distinction between great and small tithes has been known. Both *Gibbs* C. J. and the present Master of the Rolls have expressed an opinion that seed tares are a small tithe. The opinion of the former was given in an action between the parties to this suit, in which the plaintiff elected to be nonsuited, because he was precluded, by certain admissions which had been entered into, from giving evidence of the perception of the tithe, and the Master of the Rolls, when directing this issue, made the following observations: "The only direct authority upon the point is the opinion of *Gibbs* C. J. Upon that authority and upon general principles, I am very clear that the plaintiff has nothing in support of his case but usage." That is a direct and confident opinion, not given as if it were a point upon which his Honor entertained any doubt, or wished for any advice from this court. As to the passage cited from 2 *Inst.*, where Lord *Coke* mentions *zizania* as a great tithe. Even supposing him to be speaking of great and small tithes, with reference to the division between rectors and vicars (which is very doubtful) still there is nothing to shew that his opinion is applicable to seed tares. On the contrary, as he uses

(a) 3 *Wood*, 245.

1929.

DART
against
BANK

the word *zizania* generally, he must be presumed to have spoken of tares in their more valuable state, and in which they were generally used, viz. either cut green and given in that state to cattle, or cut green and made into hay. If it be held that the word *zizania* includes seed tares, it must also include green tares, and yet they are held to be a small tithe. *Wallis v. Pain* (a.) It has been contended, that seed tares, or tares harvested, are different from the seed of tares alone. But if that were so, still the stalk could only be likened to hay, and then the vicar's right would be established; for being entitled to the tithe of hay, he is entitled to the tithe of that which is in the nature of hay. *Steers v. Brazier* (b). *White v. Read* (c), *Darrel v. Withers* (d). And when *Comyn C. B.*, in *Wallis v. Pain*, says that tares mowed or cut when ripe are a great tithe, that is plainly because then they partake of the nature of hay; he does not mean to speak of seed tares. If the plaintiff's landlord be not rector, then his claim depends upon the meaning of the words *garbarum et granorum*, in the grant of Queen *Elizabeth*. There cannot be any doubt that the word *garbarum*, in its ordinary acceptation, means "corn bound up." *Southcott v. Southcott* (e), *Fairfax v. Fairfax* (f), *Pigot v. Hearn* (g), and in *Barsdale v. Smith* (h), where it was held that the tithe of hay might have passed under the word *garba*; yet that was by a grant in the time of *Henry 3.*, and the case goes on to say: "But now it has obtained a different meaning, viz. sheaf of corn." That case was decided in the time of *Eliz.*, by whom the grant now relied

(a) 2 Com. 640.

(b) 2 Gw. 742.

(c) 8 Wood, 158.

(d) 3 Keb. 479.

(e) Styles, 108.

(f) Ib. 238.

(g) Cro. Eliz. 599.

(h) Ib. 633.

1823.

 DAVIS
 against
 BENK.

upon was made. But *Sims v. Bennett* decides this point in favour of the defendants, for it was there held, that things which are *decimæ garbarum*, when suffered to ripen, are also *decimæ garbarum* when green. If, then, the plaintiff were entitled to the tithe of harvested or seed tares as tithe *garbarum*, he would also be entitled to the tithe of tares cut green; but the vicar's right to that is admitted. It is therefore clear, that the plaintiff cannot establish a right to this tithe upon the word *garbarum*. The authority of *Lindwood* is decisive to shew, that this tithe did not pass by the word *granum*; in commenting on that word, he says, "Generale est cuiuslibet seminis, per excellentiam tamen intelligitur specialiter de frumento." And in *Southcott v. Southcott* (a), *Roll J.* says "Seminavit cum grano is proper enough, for, by common construction, it shall mean with corn and not with seeds." Should the Court, however, be of opinion that the tithe in question might pass by a grant of the tithes *garbarum et granorum*, still the plaintiff cannot be entitled to it, unless it be a great tithe, for the endowment of the vicarage must have been before the dissolution of the monasteries, and the perception of all other small tithes, raises a presumption (not to be rebutted by payments made under a mistake) that the endowment included all small tithes; and if that be so, the crown could have no title to this if it be a small tithe, and therefore could not convey it to another. Lastly, whatever may be the rights of the plaintiff's lessor, the words of the lease being "corn, grain, and all other rectorial or great tithes," he cannot recover, unless it be included in that description. Tares are not corn, they are never called so in common par-

(a) *Styles*, 108.

lance, and are not included amongst corn in any of the statutes made to regulate the exportation and importation of provisions; that they are not grain appears from the cases before cited, they are not a great tithe, and rectorial and great are evidently used as synonymous words; indeed, if they were not so, nothing would pass by the word *rectorial*, used in a lease made by a person who is not rector.

1823.

 DAWKINS
 against
 BENT.

Wilde, in reply. The opinions of *Gibbs* C. J. and the Master of the Rolls cannot be relied upon as authorities in this case. The former was a mere dictum at *Nisi Prius*; the question was not at all discussed or considered, for the plaintiff at once elected to be nonsuited, when he found that the evidence of perception would not be received. The Master of the Rolls clearly intended to have the opinion of this Court upon the whole question, by sending an issue in the general form which he has adopted. But whatever may have been their opinions as to the nature of the tithe, the question really is, what was supposed to be the nature of this tithe, when the presumed endowment of the vicar was made. In all instances where the tithe of articles newly introduced has been claimed by vicars, under an endowment of all small tithes, it has been presumed that all things which might at any future time be considered small tithes were intended to pass. But here that presumption is negatived by a fact, viz. that the tithe of seed-tares has never been paid to the vicar, and they were cultivated before the time of legal memory. Upon that ground alone the plaintiff would be entitled to judgment in his favour; but, besides that, the tithe in question is both a great tithe and a tithe *garbarum*.

1823.
 2281
 DAWSON
 v. HATTON
 1823.

BAYLEY J. I am of opinion, both upon the usage and upon the authorities, that the plaintiff is entitled to this tithe. It appears that Queen Elizabeth granted to certain persons "omnes decimas garbarum et granorum annuatim, &c. in *Hatton*," and the plaintiff is lessee under those who are now entitled to the tithes conveyed by that grant. It has been contended, for the defendants, that although the vicar be not entitled to the tithe in question, still if it be not included in the words of the grant, it remains in the crown, and that, consequently, the plaintiff cannot be entitled to recover. If that were so, there would be three parties entitled to tithe in this parish, the vicar, the grantee, and the crown. That state of things would be so singular and unusual, that I cannot but suppose the crown intended to pass all that was vested in it, upon the dissolution of the religious house to which the rectory was before annexed. It is probable that the original endowment of the vicar was of all tithes except those *garbarum et granorum*, and that the crown adopted those words in the grant, because they comprehended all the tithes which were vested in it. I am, therefore, of opinion, that the grant of 41 Eliz. connected with usage, conveyed by the words *garbarum et granorum*, all that was vested in the crown, and this tithe, amongst others, if it did not belong to the vicar. The grantee then stands in the place of the crown, and this question must be considered as between rector and vicar, unless the lease to the plaintiff includes only a part of that to which the landlord is entitled. The words in the lease are, "the tithes of corn and grain, and all other rectorial or great tithes." If the seed of tares be grain *cadit questio*, but if not, then we must consider what sense is to be put upon the words "rectorial

"rectorial or great tithes," when used in a lease granted by a person who stands in the situation of rector. Rectorial or great tithes mean different things, with reference to the rectory in respect of which the lease is made. All tithes were originally rectorial; vicarial tithes are merely those which, by the endowment, are taken from the rector. I think, then, that the grant contained all that was in the crown, and that the lease was of all given to the grantee; the question is, therefore, in all respects to be considered as between rector and vicar. Now usage is to be acted upon in this as in other cases, and its effect appears to me decisive. In the parish of *Hatton* it has been the practice to render the tithe of tares, when cut green, to the vicar (probably as resembling agistment tithe). Of tares in any other state the tithe has been paid to the rector. It has been urged for the defendant, that such payment was made through mistake, and, therefore, is not binding on the parties. If the expression of the witnesses applied to this parish alone, it would merely prove the tithe in question to be a rector's tithe, although they may have improperly called it a great tithe. The witnesses might give good evidence as to the fact of the tithe being taken by a particular person, but their evidence as to the prevailing opinion cannot give it the legal character of a great or small tithe; but usage may make a tithe rectorial or vicarial in any particular parish, whether it be great or small. Thus, in *Nicholson v. Elliott* (a), the vicar, by usage, shewed himself entitled to the tithe of peas and beans; there then the tithe was vicarial. In *Gumley v. Burt* (b), where there was no usage, the same tithe was held to be rectorial. The important part of

1823.

SWAYNE
vs. DAVIS
appeals
Brown.

(a) *Bunb.* 19.(b) *Ib.* 169.

1893.
5587

the evidence is, that the vicar acquiesced, in the rector's claim, and he was the person most likely to be acquainted with his own rights. After stating the grant and the lease, the case describes the mode of cultivating tares and the uses to which they are applied. The tares when cut ripe do not consist of seed only, but of stalks also, and the seed is not used merely for re-production, but for the food of some things maintained on the farm. The vicar's endowment was not proved; we do not therefore know that he has all small tithes except this, if it be small. If an endowment had given him all small tithes, then we should have been bound to decide whether this be great or small. In this case the terms of the endowment must, in some particulars, have gone beyond small tithes, for the vicar has the tithe of hay. But without considering in this case whether the tithe be great or small, the usage satisfies me that the vicar never was endowed of it. It has been attempted to liken this to tithes of seeds, which for the most part are considered small, but there are many authorities which put seed tares on a different footing from other seeds. Lord Coke, in his *2d Inst.* speaks of *zizania* generally as a great tithe; and if he had considered seed tares a small tithe he would no doubt have mentioned it, in order that he might not mislead his readers. There are two or three passages in the judgment of *Comyn C. B.*, in *Wallis v. Pain*, which bear strongly on this point. He observes, that there may be a proper distinction between peas and beans, and other pulse which had existed in former times, and those things which were of modern introduction: for that appropriations were often made to religious houses *de bladis et leguminibus*. Now *legumen* is a general word applicable to all pulse, and may include tares. Then there is another passage, "Vetches
are

are a great tithe, if mowed or cut when ripe, but if cut green for cattle, they are a small tithe." In the former part of the same passage, *Comyn C. B.* was discussing the nature of the tithe of seeds, and had he considered that seed tares were titheable in a different mode from tares cut when ripe, it is most probable that he would have mentioned it. With respect to the meaning of the word *garba*, in the grant of Queen *Elizabeth*, the case of *Sims v. Bennett* is very important. The claim there was of the tithes of peas and beans gathered green, made by a vicar who was endowed of all tithes except *decimas garbarum et granorum*. Unless, therefore, tithes of peas and beans had been *decimæ garbarum*, the plaintiff would have been entitled to recover. Lord *Henley* thought that the tithe was within those words, for that *garba* means *quod ligari potest*. It must also apply to tares, which are similar in nature to peas. He observes, too, that generally, a thing which is a great tithe in one state is also a great tithe in all, and says, that the cases determined respecting certain seeds, are exceptions founded on Lord *Coke's* dictum, that seeds are small tithes. But Lord *Coke* does not include tares amongst those tithes. On the contrary, he says, that *zizania* are a great tithe. Dr. *Burn* classes tares with grain and not with seeds. It appears, too, that there was an appeal against the decision of Lord *Henley* in the case of *Sims v. Bennett*, and the appellant urged, as an argument in his favour, that peas and beans resembled tares, which had been held to be a small tithe when cut green, but great when suffered to remain on the land until ripe. It would have been very important to him to shew that seed tares might be considered in a different light from tares cut at maturity, and harvested; and as as no such

1822

—
 Dore
 against
 Broun

distinction was attempted to be established, it is fair to suppose, and none was at that time supposed to exist. Upon these authorities, then, I think that the tithe of seed tares is a great tithe, that it is included in the words *decimæ garbarum*; and that even if it were not, still the plaintiff, standing in the situation of rector, would be entitled to recover.

HOLROYD J. I am of opinion that the plaintiff is entitled to the tithe in question. He claims it under the grant and lease set out in the case. For the defendants it has been objected, that the tithes of tares are not *decimæ garbarum* or *granorum*, and, even if they are, that they are not included in the lease. I think it is clear that this tithe passed by the grant; for, if it be not within the meaning of *granum*, still *garba* is sufficient to convey it. All Lord Henley's reasoning in *Sims v. Bennett* shews that this is a tithe which may pass by the words *decimæ garbarum*. But whether he be correct or not, in supposing that *garba* includes not only what is, but what may properly be bound up in sheaves; the usage in this case is sufficient to shew that tares were so bound at the time when the grant was made. Lord Henley's decision (which was afterwards confirmed by the House of Lords,) shews how large a construction may be put upon that word when sanctioned by usage. The usage is, in my judgment, decisive of this question. It has been urged, that the words *decimæ garbarum* cannot be taken in their larger sense in this case, for that *Sims v. Bennett* proves that what is *garba* when ripe is also *garba* when green, and that, therefore, the tithe of tares cut green must be as much *decimæ garbarum* as of tares left to be ripe; and then it is said that
the

the rector, if entitled to all tithes *garbarum*, would be entitled to the tithe of tares cut green; whereas the case states that the vicar is entitled to that tithe. The proper answer to that argument appears to be, that perception shews the extent of the vicar's endowment, and that he must be presumed to have been endowed of the tithe of tares cut green; if so, that tithe could not pass by the grant of *Elizabeth*, although it might be comprehended in the words of it. Then, upon the lease, it is contended, that this is not a tithe of "corn or grain." It is not necessary to determine that point, for there are also the words "rectorial or great tithes," and I think this a "rectorial," if not a "great" tithe. Queen *Elizabeth* claimed under a religious house, to which the rectory belonged; and, therefore, the tithes *garbarum et granorum* would, in her hands, be "rectorial," whether great or small, and would continue to be so in the hands of her grantee. Rectorial and great tithes have, therefore, different meanings, and the former includes every thing that does not belong to the vicar. But I also think that the tithe of seed-tares is a great tithe. Lord *Coke*, in his 2 *Inst.*, gives *zizania* as an example of great tithes; and in *Smith v. Hodgson* (a), *Wallis v. Pain*, and *Sims v. Bennett*, a similar opinion appears to have been entertained. It was not disputed in any one of those cases, that ripe tares were a great tithe; the only dispute was, whether green tares were a small tithe. In the present case, the tares are cut when ripe. My opinion is not founded upon the use which is made of them; for Lord *Henley*, in *Sims v. Bennett*, says, that the nature of the tithe depends upon the nature of the titheable matter, and not

1843. I

 Dams. G
 against
 Bams. I
(a) 2 *Wood*, 21.

1823.

DAVE
vs. THE
BISHOP
47211

upon the use to which it is applied. Now tares are a pulse, and rather resemble beans and peas, than those things which are usually called seeds. Upon the authorities, then, I think we are bound to say that this is a great tithe; and even if it were not, it is at all events in this parish rectorial, and passed by the words *decime garbarum*. The vicar has received small tithes generally; but he produced no endowment; his presumed endowment must, therefore, be limited by perception, and he cannot be entitled to this tithe, for he has never received it. An attempt has been made to explain away the effect of non-perception, by attributing it to mistake; but there is nothing to shew that the vicar was ever mistaken. The evidence only amounts to this, that the witnesses paid it as a great or rector's tithe. The important part of that testimony is, that the rector always received it, and that would remove the doubt, if any existed, upon the other parts of the case.

BEST J. It appears to me that this is a pure question of law, viz. whether the tithe of seed tares is a great tithe, and passed under the grant in question; or, whether it is a small tithe, and therefore belongs to the vicar, he being entitled to all other small tithes. I have never been able to discover any intelligible principle upon which to decide what is a great and what a small tithe. For a long time it was considered as a question of fact, depending upon the quantity of the article cultivated in the particular parish. It is now settled that the question depends upon the nature of the thing, and not upon the quantity of it, which may happen to be produced. It would be satisfactory, if any precise authority could be found, as to what things

are

are to be considered great and what small tithes. In the absence of any authority, all that we can do is to determine the nature of any tithe by its resemblance to some other article, with respect to which a decision has already taken place. That is the only safe rule upon which we can proceed. Then the question is simply this: Do seed tares more resemble those things which are called grain, and have been determined to be great tithes, or those which are called seeds and are small tithes? It is true that they are principally used as seed, for re-production, but do they resemble those seeds which have been decided to be small tithes? Not in the least; not one of them is leguminous; not one of them is produced in a pod, as tares are. *Lindwood*, p. 192., under the word *Seminum*, mentions various seeds, but does not include tares; he did not then consider them as seeds, and therefore they do not come within that which Lord *Henley*, in *Sims v. Bennett*, calls an exception from the general rule. Indeed it is quite manifest that his Lordship thought them different from seeds usually so called. His reasoning is to shew, that what is a great tithe in one state is also a great tithe in another; and he instances tares, which, according to *Hodgson v. Smith*, are a great tithe, whether cut green or ripe; and he proceeds, "Nothing breaks into these resolutions, but that the Exchequer have determined *clover seeds* to be a small tithe." Now he could not have said that, unless he had considered seed tares to be different in nature from clover seed. They rather resemble peas and beans, leguminous plants, and which, according to *Camyn C. B.* in *Wallis v. Pain* (a), are to be distinguished from seeds

1886

PAUL
DAVE
MAY
BENN.

(a) 2 Com. 639.

1823.

DAWE
against
BENN.

newly introduced, and which are small tithes. I am, therefore, of opinion ~~that~~ this is a great tithe, and that it passed by the grant of Queen *Elizabeth*, who must be supposed to have intended to give to the grantee all that the vicar was not entitled to. If it were a small tithe, the grant would not take it from the vicar, nor is the usage available to shew whether it be a great or a small tithe. If it were a small tithe, the perception by the rector would only prove that the vicar's rights have been neglected. I presume that the Master of the Rolls wished to inquire whether the usage would warrant such a construction of the grant as would make it convey all that came to the crown upon the dissolution of the religious house to which the rectory of *Hatton* had been annexed.

Postea to the Plaintiff.

END OF EASTER TERM.

AN INDEX

TO THE PRINCIPAL MATTERS.

ACCEPTANCE.

See ASSUMPSIT, 2. BILL OF EXCHANGE, 7.

ACTION ON THE CASE.

See HUNDRED, ACTION AGAINST.

1. Where the goods of *A.* were distrained for rent arrear, after the amount had been tendered: Held, that *A.* might bring an action on the case for an excessive distress. *Branscomb v. Bridges and Another*, *H. 3 & 4 G. 4.* Page 145
2. By 9 G. 1. c. 22. s. 7., the inhabitants of the hundred are to make satisfaction for damages occasioned by the acts therein mentioned: Held, that under this statute, the action must be against all the inhabitants of the hundred; and the declaration being against two only, it was held bad on motion in arrest of judgment. *Jackson v. Pearson and Squirrel*, *H. 3 & 4 G. 4.* 304

ADMINISTRATOR.

1. Where a bill of exchange was indorsed generally, but delivered to *S. C.*, as administratrix of *J. C.*, for a debt due to the intestate, and *S. C.* died intestate after the bill

ADMINISTRATOR.

became due, and before it was paid: Held, that the administrators, de bonis non of *J. C.*, might sue upon the bill; and that their title was sufficiently proved by the letters of administration, de bonis non, without producing those granted to *S. C.*, the administratrix. *Catherwood and Another, Administrators, v. Chabaud*, *H. 3 & 4 G. 4.* Page 150

2. *A.* mortgaged lands in fee to *B.* and Co., with a power of sale upon trust to repay themselves the monies advanced, &c., and to pay over the surplus to *A.*, his executors or administrators. Before any sale was made, *A.* died, having devised all his real and personal property to *C.* and *D.* (whom he also made executors,) upon trust to sell and pay debts, &c. During the lifetime of *C.* and *D.*, *B.* and Co. sold the estate, and paid the surplus into the hands of *E.*, who was agent for *C.* and *D.* Whilst the money remained in *E.*'s hands, *C.* and *D.* died. *E.* also died soon after, leaving the defendant his executor. The plaintiffs having taken out administration de bonis non,

non, with the will of *A.* annexed, brought an action for money had and received against the defendant: Held, that it could not be maintained; for that the money in the defendant's hands was equitable, and not legal assets, and therefore would not have been recoverable by *C.* and *D.* in their representative character.

Held, also, that a promise made by the defendant to pay the money to the plaintiff was merely nudum pactum, they not being entitled to receive it. *Clay and Others, Administrators de bonis non, v. Willis.* *H. 3 & 4 G. 4.* Page 364

ADVOCATE.

See PRISONER, 1.

AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE, 6.

AFFIDAVITS, (entitling.)

See CERTIORARI, 4. PRACTICE, 22.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See BILL OF EXCHANGE, 7.

1. An executory agreement to transfer a share of a vessel, is void by the 34 G. 3. c. 68. s. 14., unless it contains a recital of the certificate of registry. *Biddell v. Leeder and Pulham, H. 3 & 4 G. 4.* 327
2. Where an agreement was made between *A.* and *B.* that the former should sell certain premises to *B.*, if it turned out that he had a title to them, and that *B.* should have the possession from the date of that agreement: Held, that an ejectment could not be maintained by *A.* against *B.* without a demand of possession, although the object of the action was to try the title to

APPEAL.

the premises. *Doe dem. Newby v. Jackson, H. 3 & 4 G. 4.* Page 448

AMBASSADOR.

Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings: Held, that his goods in that house not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates. *Novello v. Toogood, E. 4 G. 4.* 554

AMENDMENT.

See PRACTICE, 24.

ANNUITY.

See BOND, 1.

The 17 G. 3. c. 26. s. 4. is not imperative on the Court, but it is in their discretion either to vacate the securities given for an annuity in case of a violation of that clause of the act, or to do so on certain terms, or to refuse to do so, according to the circumstances of each particular case. *Girdlestone v. Allan, M. 8 G. 4.* 61

APPEAL.

See JUSTICES, 6.

1. A clause in a private inclosure act, declaring that no item or charge in the accounts of the commissioners shall be binding to the parties concerned, or valid in law, unless the same shall have been duly allowed by a justice of peace in the manner therein pointed out, does not take away an appeal given by a subsequent clause, "to the party grieved by any thing done in pursuance of that or the general inclosure act, (other than, and except such determinations as were by that or the general inclosure act declared to be binding, final, and

and conclusive of the allowance of the accounts by a justice not falling within this exception. *The King v. The Justices of Cumberland, M. 3 G. 4.* Page 64.

2. Where an order of bastardy has been made and the time for appeal past, it cannot be enforced under 18 *Elis. c. 3.*, but the magistrate must proceed under 49 *G. 3. c. 68. s. 3.* by commitment for three months. *Ex parte Addis. M. 3 G. 4.* 87

3. Notice of appeal against an order of filiation was given in the following form: "I, A. B. of, &c., intend, at the next general quarter sessions to be holden, &c., to commence and prosecute an appeal against an order of filiation, made, &c., whereby I was adjudged to be the father of a bastard child, born on the body of E. R., and chargeable to the parish of S." Held, that this notice was insufficient, the cause and matter of appeal not being set out as required by 9 *G. 3. c. 68. s. 5.* *Rex v. The Justices of Oxfordshire, H. 3 & 4 G. 4.* 279

APPRENTICE.

See COVENANT, 4. PLEADING, 20. SETTLEMENT BY APPRENTICESHIP.

APPROPRIATION.

See BILL OF EXCHANGE, 7.

A. sold goods to B., at whose risk they were shipped for Lisbon, to be paid for by bills drawn upon R. and Co. C. went as supercargo and trustee for A. and B., and was to retain possession of the goods until the amount of the bills drawn upon R. and Co. was remitted, and then the bill of lading was to be delivered up to B. B. directed R. and Co. to effect an

insurance, which was done at his expense, and not in pursuance of any agreement between him and A. The ship, with the goods on board, was captured, and the underwriters paid a total loss to R. and Co., who gave B. credit for the money, part of which they paid over to him, and part to his assignees after he had become bankrupt. R. and Co. paid part of the bills drawn upon them, and rejected others. In an action brought against them by A. for money had and received to his use: Held, that they were not bound to apply the money paid on the policy to the discharge of the bills drawn by B. for the goods. The defendants in answer to an application by plaintiff, stated that they could say nothing about some of the bills in question not then accepted, and that their fate must depend upon the state of Williams' account when they become due: Held, that this was not a conditional acceptance, and did not bind R. and Co. to apply to the payment of the bills, any money that they might receive on account of Williams. *Neale. Administratrix, v. Reid, E. 4 G. 4.* Page 657

ARBITRAMENT.

See COSTS, 2.

1. In an action against several defendants, a verdict was taken for the plaintiff for 400*l.* damages, subject to a point of law reserved for the opinion of the Court; and in case that point should be determined in favour of the plaintiff, then subject to the award of a barrister as to the damages. The point of law having been decided in favour of the plaintiff, the arbitrator having been consulted by one of the parties in the cause, declined proceeding in the reference. One

One of the defendants refused to name any other arbitrator. Under these circumstances the Court ordered judgment and execution to issue against that defendant for the damages found by the jury, unless he would consent to refer the damages to some other arbitrator. *Woolley, Executrix, v. Kelly and Others*, M. 3 G. 4. Page 68

2. Personal knowledge of an award and rule of court makes the party liable to an attachment for not performing the award, although he has not been personally served. *In the Matter of Bower*, H. 3 & 4 G. 4. 264

3. Where a cause and all matters in difference were referred to an arbitrator, but nothing was said about costs: Held, that the arbitrator had power over the costs of the cause, but not those of the reference. *Firth v. Robinson*, H. 3 & 4 G. 4. 277

ARREST.

See BANKRUPT, 3. CONVICTION, 1. JUSTICES, 4. PRACTICE, 11.

ARTICLES OF CLERKSHIP.

See ATTORNEY, 4. PRACTICE, 27.

ASSETS.

See ADMINISTRATOR, 1, 2. PLEADING, 18.

ASSIGNMENT.

See BANKRUPT, 10.

ASSUMPSIT.

1. Where two breaches were assigned on one count of a declaration upon a contract, and the defendant paid money into court upon one of them: Held, that he thereby admitted the whole contract as set out in that count. *Dyer v. Ashton*, M. 3 G. 4. 3

2. An action for money had and received, brought against the receiver of an estate to recover money received by him for rent, for the purpose of trying the title of the estate, is an action for rent within the meaning of the 39 & 40 G. 3. c. 104. s. 13. the *London Court of Request Act*; and the plaintiff, although he recovered less than 5*l.*, was held to be entitled to costs. *Drew v. Fletcher*, H. 3 & 4 G. 4. Page 283

3. A mortgaged lands in fee to B. and Co., with a power of sale upon trust to repay themselves the monies advanced, &c., and to pay over the surplus to A., his executors or administrators. Before any sale was made A. died, having devised all his real and personal property to C. and D. (whom he also made executors,) upon trust to sell and pay debts, &c. During the lifetime of C. and D., B. and Co. sold the estate and paid the surplus into the hands of E. who was agent for C. and D. Whilst the money remained in E.'s hands, C. and D. died, E. also died soon after, leaving the defendant his executor. The plaintiffs having taken out administration de bonis non with the will of A. annexed, brought an action for money had and received against the defendant: Held, that it could not be maintained; for that the money in the defendant's hands was equitable, and not legal assets, and therefore would not have been recoverable by C. and D. in their representative character: Held, also, that a promise made by the defendant to pay the money to the plaintiffs was merely nudum pactum, they not being entitled to receive it. *Clay v. Willis*, H. 3 & 4 G. 4. 364

4. A. and Co. and B. and Co. respectively carried on the business of bankers at Maidstone. B. and Co.

Co. became bankrupt, and at the time of their act of bankruptcy the two banks held notes and other securities of each other to nearly the same amount. The provisional assignee of B. and Co., knowing that fact, presented and obtained payment of the notes of A. and Co., partly at their bank, and partly at the house of their agents in London, who were ignorant of the situation in which the parties stood: Held, that A. and Co. might recover the amount so received, in an action for money had and received against the provisional assignee. *Edmeads and Others v. Newman*, H. 3 & 4 G. 4. Page 418.

5. A. sold goods to B., at whose risk they were shipped for Lisbon, to be paid for by bills drawn upon R. and Co. C. went as supercargo and trustee for A. and B., and was to retain possession of the goods until the amount of the bills drawn upon R. and Co. was remitted, and then the bill of lading was to be delivered up to B. B. directed R. and Co. to effect an insurance, which was done at his expense and not in pursuance of any agreement between him and A. The ship, with the goods on board, was captured, and the underwriters paid a total loss to R. and Co., who gave B. credit for the money, part of which they paid over to him, and part to his assignees after he had become bankrupt. R. and Co. paid part of the bills drawn upon them and rejected others. In an action brought against them by A. for money had and received to his use: Held, that they were not bound to apply the money paid on the policy to the discharge of the bills drawn by B. for the goods. The defendants in answer to an application by plaintiff, stated that they could say nothing about some of the bills in question, not

them accepted, and that their fate must depend upon the state of Williams' account when they became due: Held, that this was not a conditional acceptance, and did not bind R. and Co. to apply to the payment of the bills, any money that they might receive on account of Williams. *Neale, Administratrix, v. Reid*, E. 4 G. 4. Page 657.

6. Declaration that defendant was indebted to plaintiff in account, and thereupon, in consideration of the premises, and that plaintiff would take and accept the work and labour of the defendant as a plumber and glazier, at reasonable prices, to the extent of that debt, defendant promised to do the work. Counts for money had and received, &c. It was proved that the plaintiff by deed had assigned certain premises to the defendant for a sum of money therein mentioned. The deed stated that sum to have been well and truly paid, and released the defendant therefrom. Parol evidence was given to shew, that in fact part of the purchase-money had not been paid, but that it was agreed by parol between the parties at the time of the execution of the deed, that that part of the purchase-money should be retained by the defendant, and that he should do work for the plaintiff to that amount: Held, that if this evidence was admissible, still it did not support the declaration: Held, secondly, that assuming the legal effect of the agreement to be, that the entire consideration-money had been paid, and that part was returned in consideration of the defendant's promising to do work, the parol evidence would not contradict the deeds, and would be admissible, but that, inasmuch as the original debt was extinguished by the release in the deeds, and no new debt was created

ated, but merely an obligation to do work arising out of a new special contract that ought to have been declared upon. *Baker v. Dewey, E. 4 G. 4.* Page 704

ATTACHMENT.

See PRACTICE, 201. ARBITRAMENT, 2.

ATTORNEY.

An attorney of the court of K. B. may sue out a commission of bankruptcy, and maintain an action for the fees due upon that business, without being admitted a solicitor in Chancery. *Wilkinson, Gent., one, &c., v. Diggell, H. 3 & 4 G. 4.* 158

Where the attorneys for the plaintiff and defendant, in a cause which was ready for trial, entered into an agreement whereby they personally undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a certain manner: Held that the attorney for the plaintiff was personally bound to pay the costs when taxed in the mode specified. *Iveson, Gent., one, &c., v. Conington, Gent., one, &c., H. 3 & 4 G. 4.* 160

An attorney entering a plaint, and suing out process in the county court during the time of his imprisonment, is within the meaning of 12 G. 2. c. 13. s. 9, and liable to be struck off the roll. *In the Matter of Flint, Gent., one, &c., H. 3 & 4 G. 4.* 254

Articles of clerkship were duly stamped and executed, and transmitted to agents in town for the purpose of being enrolled with the proper officer of the court. It appeared that in the agents' book there was an entry in the handwriting of a clerk, who had left

the country, or his having recorded the commission and paid a fee on that occasion. But there was no entry of such an enrollment in the books kept in the master's office. The Court refused to order the voluntary payment of the duties to be registered, and the attorney to sue out the party to be admitted an attorney. *See Baker, Page 704.* H. 3 & 4 G. 4. Page 264

5. An attorney engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profit instead of a salary. The names of both were painted on the office door, and bills for business were made out and delivered in their joint hands: Held, that this was a case within 22 G. 2. c. 46. s. 11, inasmuch as the attorney had allowed his name to be used for and on account of an unqualified person; and the Court ordered the attorney to be struck off the roll, and the clerk to be committed to prison for a month. *In the Matter of Thomas Jackson and John Wood, H. 3 & 4 G. 4.* 270

6. A defendant having appeared to the action by one attorney, cannot in the same cause make any application to the Court by another, without having obtained an order for changing his attorney. *Gladders v. Moore, E. 4 G. 4.* 284

BAIL.

See BANKRUPT, 3. JUDGMENT, PRACTICE, 4. 6. 11. 15. 24. 29.

BAIL IN ERROR.

See BOND, 1. PRACTICE, 24. BANKRUPT, 4. 11.

1. Where the defendant, having agreed to lend to two persons who

afterwards became bankrupts, 900*l.* to be applied to a specific purpose, drew a cheque on his banker for that sum, and delivered it to them before their bankruptcy; and they not having used the cheque, returned it to the lender after having committed an act of bankruptcy; Held, that their assignee could not maintain trover for the cheque. *Moore, Assignee of Barthrop, v. Barthrop*, *M. 3 G. 4.*

Page 5

2. A trader having been arrested on the 20th May, desired his servants not to let into the house any persons whom they did not know, as he was afraid of being arrested again. On the morning of the 21st the doors of the house were kept shut, and no person was admitted until it had been ascertained from the window who he was: Held, that an act of bankruptcy was committed on that morning, although no creditor was actually denied. *Harvey and Others, Assignees, v. Ramsbottom and Others*, *M. 3 G. 4.* 59

3. A bankrupt, who has obtained his certificate, cannot be arrested upon a subsequent promise to pay a debt due before his bankruptcy. *Peers v. Gadderer*, *M. 3 G. 4.* 116

4. Commissioners of bankrupts are not liable to an action of trespass for committing a person who does not answer to their satisfaction when examined before them, touching the estate and effects of a bankrupt. *Doswell v. Impey and Two Others*, *H. 3 & 4 G. 4.* 163

5. A bankrupt having obtained his certificate before the rising of the Court, on the day when the second scire facies against the bail was returnable, the Court ordered an exoneratur to be entered on the bail-piece. *Johnson v. Lindsey*, *H. 3 & 4 G. 4.* 247

6. A separate commission having issued against A., and a joint commission against A. and B., the as-

signees under the separate commission obtained a verdict against C. The Court ordered the money to be paid into court until a petition, pending before the Lord Chancellor, to supersede the separate commission was decided. *Hodgkinson and Others, Assignees, v. Travers*, *H. 3 & 4 G. 4.* 272

Page 257

7. In an action by the assignees of a bankrupt brought to recover property in the bankrupt's possession as reputed owner, the plaintiffs proved that the bankrupt had once been the real owner of the goods in question, and that he continued in possession of them until he committed an act of bankruptcy: Held, that this was prima facie evidence that he continued in possession as owner, and that it then lay upon the defendant to prove that the bankrupt had ceased to be the reputed owner. The defendant proved that, long before the act of bankruptcy, the goods had been seized under an execution, at the suit of a creditor, by the sheriff, and that they were conveyed by bill of sale to the creditor, and that he afterwards demised them at an annual rent to the bankrupt, who continued in possession of them till the time of his bankruptcy. Soon after the bill of sale was executed, the creditor's initials were marked on all the goods: Held, that this was no evidence of the notoriety of the change of property; and, consequently, that there was no evidence to go to the jury that the bankrupt had ever ceased to be the reputed owner. *Lingard and Another, Assignees of Fry, v. Messiter*, *H. 3 & 4 G. 4.* 308

8. A. and Co. and B. and Co. respectively carried on the business of bankers at Maidstone. B. and Co. became bankrupts; and at the time of their act of bankruptcy, the two banks held notes and other

3 E

securities

securities of each other to nearly the same amount. The provisional assignee of B. and Co., knowing that fact, presented and obtained payment of the notes of A. and Co., partly at their bank, and partly at the house of their agents in London, who were ignorant of the situation in which the parties stood: Held, that A. and Co. might recover the amount so received, in an action for money had and received against the provisional assignee. *Edmeads and Others v. Newman*, H. 8 & 4 G. 4. Page 418

9. In an action on the 9 Anne, c. 14, brought by the assignee of a bankrupt to recover money lost by the bankrupt at play, the bankrupt, who had obtained his certificate, was called as a witness to prove the loss: Held, that he was incompetent, but that his competency was restored by three releases: first, by the bankrupt to the assignee; second, by all the creditors to the bankrupt; third, by the assignee (who was not a creditor,) to the bankrupt: Held, secondly, that a year after the commission issued, it might be presumed that all the creditors had proved, and that a release signed by all those who had proved might therefore be considered as a release by all the creditors; thirdly, that such a release did not destroy the assignee's right of action. *Carter, Assignee, v. Abbott and Others*. H. 3 & 4 G. 4. 444

10. A. B. being sole owner of a ship, by indenture of the 24th June, 1819, assigned three fourth shares of it to a creditor, as a security for a debt. The deed contained a clause by which the creditor was to reconvey the three fourth shares upon payment of his debt, and a power of sale to the creditor, in case the debt was not paid within a given time: A. B. was to be paid of the new money and

misted to freight the ship, and to load cargoes from time to time, and was to insure the ship for the amount of the debt for the time of the freight, he was to be assigned the policies to him, and the situation of the execution of the deed, the ship was absent from her port of registry for a voyage to North America, but all the terms prescribed by the ship registry acts, as to the transfer, were duly complied with. The ship returned to her port of registry in July 1829, and was constantly employed from that time till February, 1832, by A. B. in carrying cargoes for his own use and on his sole account, and he continued during all that time in the actual possession of the ship, and to manage and navigate her without the interference or control of the creditors: A. B. having become bankrupt, it was held, that as he had once been the real owner of the whole ship, and had never done any thing to make it notorious to the world, that he had ceased to be the owner of the three fourth shares, he continued to be the apparent owner of those shares, with the consent of the true owner, down to the time of the act of bankruptcy, and, therefore, that those shares passed to his creditors, as property in his order and disposition within the meaning of the 21 Jac. 1. c. 19. *Kirkley and Blagburn, Assignees, v. Mahon*. E. 4 G. 4. Page 688

11. Commissioners of bankrupts cannot give a bankrupt a protection for an unlimited period of time in order to enable him to make a full disclosure of his estate and effects. *Cloughton v. Leigh*, E. 4 G. 4. 652

12. A testator being seized of the mansion-house of B. for his life, and being the owner of certain chattels, devised the house to A. and the chattels to B. and his

trustees upon trust, so permit the same to be held and enjoyed by the person who, for the time being, would be entitled to the possession of his freehold estates; and he further directed, that whilst the said freehold estates should be held and enjoyed by the person entitled to his said mansion-house, the said chattels should be kept in the mansion-house, and not removed therefrom, unless with the consent of the trustees. Upon the death of the testator, the goods and chattels were in the said mansion-house, and his son then became seised of the freehold estates, and entitled to the mansion-house for his life, and remained in the occupation of the same, and of the household furniture, &c. mentioned in the will: Held, that even if the son of the testator had been a trader, and become a bankrupt, and had had the goods in his possession at the time of the act of bankruptcy, under the above circumstances they would not have passed to his assignees as property in his order and disposition, within the meaning of the 21 *Jac.* 1. c. 19., and therefore that a collector of taxes was not justified in distraining these goods for taxes due from the son in respect of horses, carriages, dogs, &c. under the 49 G. 3. c. 99. s. 98., by which collectors of taxes are authorised to use all remedies and powers which, by any acts concerning bankrupts, are given to creditors. Quere, whether that section applies to persons not subject to the bankrupt laws? *The Earl of Shaftesbury and Others v. Russell*, E. 4 G. 4. Page 686

BARON AND FEME.

Where an action was brought against A. and B. and C. his wife, upon a joint promissory note made by A.

and C. before her marriage, and the promise was laid by A. and C. before her marriage, and defendants pleaded the statute of limitations, whereupon issue was joined: Held, that an acknowledgment of the note by A. within six years, but after the intermarriage of B. and C., was not evidence to support the issue. *Pittem v. Foster and Others*, H. 3 & 4 G. 4. Page 248

BASTARD.

1. Where an order of bastardy has been made, and the time for appeal past, it cannot be enforced under 18 *Eliz.* c. 3., but the magistrate must proceed under 49 G. 3. c. 68. s. 3. by commitment for three months. *Ex parte Addis*, M. 3 G. 4. 87
2. Notice of appeal against an order of filiation was given in the following form: "I, A. B., of, &c., intend at the next general quarter sessions to be holden, &c., to commence and prosecute an appeal against an order of filiation, made, &c., whereby I was adjudged to be the father of a bastard child, born on the body of E. R., and chargeable to the parish of S.: Held, that this notice was insufficient, the cause and matter of appeal not being set out as required by 9 G. 3. c. 68. s. 5. *Rex v. Justices of Oxfordshire*, H. 3 & 4 G. 4. 279

BILL OF EXCHANGE.

1. The plaintiffs sold goods to G. and P., and took their acceptance for the amount, half of which was guaranteed by the defendant. Before the bill became due, G. and P. became insolvent, of which the defendant was then informed; and also that the plaintiffs looked to him for the sum which he had

guaranteed: Held, that, under these circumstances, it was unnecessary for the plaintiffs to present the bill when due, or give the defendant notice of the non-payment of it. *Holbrow v. Wilkins*, M. 3 G. 4. Page 10

2. A bill of exchange having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first. The payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff. Held, that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill so as to exonerate the drawer. *Pring v. Clarkson*, M. 3 G. 4. 14

3. Where the holder of a bill of exchange, being a security for a debt due from A., B., C., and D., indorsed over and put the bill into the hands of B., C., and D., who settled their accounts with A., saying that the bill had been satisfied by them, but the bill itself was not produced to, or seen by A. at the time of such settlement: Held, that this was no defence to A. in an action by the holder against A., B., C., and D., the bill not having been in fact satisfied by the persons to whom it had been indorsed and handed over. *Featherstone v. Hunt and Others*, M. 3 G. 4. 113

4. Where the declaration stated that a bill of exchange was indorsed by certain persons trading under the firm of H. and F., by procuration of J. D.; Held, that this allegation was supported by evidence of J. D.'s hand-writing; and that he being the managing partner in a firm which carried on all business

of buying and selling, under the designation of H. and Co., was in the habit of indorsing bills in the manner above stated; although there was no such person as F. in the firm of H. and Co., and no direct proof that J. D.'s partners were privy to those transactions. One partner may act for the whole firm by procuration. *Williamson v. Johnson*, H. 3 & 4 G. 4.

Page 146
5. Where a bill of exchange was indorsed generally, but delivered to S. C., as administratrix of J. C., for a debt due to the intestate, and S. C. died intestate after the bill became due, and before it was paid: Held, that the administrators de bonis non of J. C. might sue upon the bill, and that their title was sufficiently proved by the letters of administration de bonis non, without producing those granted to S. C. the administratrix. *Catherwood and Another, Administrators de bonis non, v. Chabaud*, H. 3 & 4 G. 4. 150

6. In an action by the indorsee against the drawer of a bill of exchange the plaintiff did not prove any notice of dishonour to the defendant, but gave in evidence an agreement made between a prior indorser and the drawer, after the bill became due. It recited, that the defendant had drawn, among others, the bill in question, that it was over due, and ought to be in the hands of the prior indorser, and that it was agreed that the latter should take the money due to him upon the bill by instalments: Held, that this was evidence that the drawer was at that time liable to pay the bill, and dispensed with other proof of notice of dishonour. *Gunton and Others, Assignees, v. Metz*, H. 3 & 4 G. 4. 193

7. A. and B., merchants in London, being applied to on behalf of C., resident

resident at *Demerara*, to give him a letter of credit for 30,000*l.* to enable him to purchase produce to load certain vessels for the port of *London*, and to accept his drafts at ninety days sight on receiving invoice, bill of lading, and orders for insurance to the extent of certain fixed prices for various kinds of produce, wrote to *C.*, stating that they consented to make the advances required upon the terms described; and that upon receiving the documents before mentioned, and no irregularity appearing, they would accept his drafts at the usual date, to the extent of 30,000*l.* *C.* shipped produce to the value of 800*l.* on board one vessel, and to the value of 1600*l.* on board another, and sent the necessary documents to *A.* and *B.*, and directed the surplus of the proceeds of the first cargo (after repaying the advances of *A.* and *B.*) should be paid to *D.* in *London*, and that the surplus of the second should be held by them to abide by his future advice. *C.* afterwards drew a bill upon *A.* and *B.* for 500*l.* at six months sight, and did not specify to the account of which cargo it was to be charged. *A.* and *B.* refused to accept it, and *C.* having thereupon brought an action against them: Held, first, that *C.* was not bound to draw at ninety days, but might draw at any usual date, and that six months could not be considered unusual, the jury not having found it to be so. Secondly, that *C.* was not bound to specify to which cargo the bill was to be charged; for that, in the absence of any direction by him, *A.* and *B.* might charge it to either at their election. *Laing v. Barclay*, *H. 3 & 4 G. 4.*

Page 398

8. Debt by the drawer against the acceptor of a bill of exchange,

payable to the drawer or his order, for value received in goods: Held, that the action would lie. *Priddy v. Henbrey*, *E. 4 G. 4.* Page 674

BLASPHEMY.

See LIBEL.

BOND.

1. A bond conditioned to keep the plaintiff harmless from the payment of an annuity, and from all actions, suits, damages, and costs which should be brought against him, or that he might sustain by reason of the non-payment of the annuity, is not a bond for payment of money only within statute 3 Jac. 1. c. 8.; and, consequently, upon error brought to reverse a judgment obtained in an action on such bond, bail in error are not required. *Flanagan v. Watkins*, *H. 3 & 4 G. 4.* 316
2. Debt on a bond, whereby Sir *N. C.*, *G. S. W.*, and *J. W.* acknowledged themselves held and bound to the plaintiffs in "1000*l.* each, for which they bound themselves, and each of them for himself, for the whole and entire sum of 1000*l.* each," subject to a condition that *G. B. M.* should render a true account of all monies received by him as treasurer for the county of *Middlesex*: Held, that this was a several bond only, and that the obligees, by removing the seal of one obligor, did not render it void as to the others. *Collins and Others v. Prosser and Others, Executors*, *E. 4 G. 4.* 682

BRIBERY ACT.

Where a voter received money after an election for having voted for a particular candidate, but no agreement for any such payment was made before the election: Held, 3 E 3 that

by grant successively, and the grantee dies during the life or lives of any one or more of such other persons, without having devised the said copyhold tenement, such other person or persons shall be entitled by virtue of such grant, to take and hold the copyhold tenement successively, as they are respectively named in the grant, during his or their life or lives respectively; but if the grantee devise the copyhold tenement, the devisee shall take and hold it during the life or lives of the said issue, viz. Held, that as this was a good custom. *Doe dem. v. Wharton*, 10 *Surf. v. Goddard*, E. 1044 G. 4. *Page 522*

Mandamus to the lord and steward of the manor of M. and F. to hold in a court, and accept a surrender of a piece of copyhold land from A. and his wife, and admit B. Return, that there is a custom within the manor, that if any person, not before being a customary tenant, or not being resident within the manor, takes any interest as a purchaser, by surrender or otherwise, of any lands, &c. within the manor, he shall pay for his fine on admission, as he and the lord can agree, (which is usually assessed at two years' value;) but persons already being customary tenants, or resident within the manor, pay another and a smaller fine to the lord, upon so taking any such interest. That B. having purchased the equity of redemption of a customary estate of considerable value afterwards, and before he was admitted to that estate, purchased the land in question, being a small customary estate, in order to be bound to that first, and to elude the payment of the larger fine, whenever he should apply to be admitted to the larger estate, and thereby to defraud the lord of his said fine. Upon exceptions: *hns*

Held, that the return was bad for that B. might lawfully make such second purchase, in order to avail himself of the custom in favour of tenants of the manor. *11 E. 1044 G. 4. 1045*

Secondly, that if the second purchaser were fraudulent, still the purchaser would be entitled to admission, but would not be thereby enabled to avail himself of the custom. *The King v. Bingley, 10 E. 1044 G. 4. 1045*

Page 565

CORN RENT.

See LANDLORD AND TENANT, 3. INCLOSURE ACT, 4.

CORPORATION.

See HOUSEHOLDER, 1. 1044 G. 4. 1045

RATE, 2. QUO WARRANTO, 1.

1. A bye-law of a corporation directed that, upon the happening of any vacancy in the number of twenty-four common-council, such vacancies should be filled by the freemen inhabiting the town; and that a court should be holden once every year, at which it should be lawful for the bailiffs to admit to the freedom of the town such persons of good fame as had been resident therein for one whole year: Held, that this bye-law did not give to every such person who had been so resident for that period an absolute right to be admitted to the freedom of the borough; and the Court refused a mandamus to the bailiffs to admit such a person, although it appeared that he had been fined for carrying on a trade within the town without being admitted to his freedom. *Re v. The Bailiffs and Corporation of Ely*, 10 E. 1044 G. 4. 1045

2. Where a corporation consisting of a mayor, alderman, and twenty-four capital burgesses, was seized in fee of certain pasture lands, and appointed

appointed a ranger to keep the keys of the gates, clean the ditches, preserve the fences, and impound cattle trespassing thereon; and at a court held annually, make such regulations concerning their pastures, and the number of cattle each burgess was to turn on, and the sum to be paid in respect thereof, which money, after deducting the expenses of the management of the land, was distributed among the burgesses who did not turn on: Held, that the corporation were liable to be rated to the poor, as the beneficial occupiers of these pastures. *Re v. The Mayor, Aldermen, and Burgesses of Sudbury.* H. 3 & 4 G. 4. Page 389

3. Where a charter directed, that out of certain persons to be nominated in a particular mode, "the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the borough for the time being, (they being for that purpose congregated and assembled together,) or the greater part of them as should be so congregated, might, by the greater part of the voices of them so assembled, choose one to be mayor:" Held, that a majority of each definite body must be present in order to make a valid election. *The King v. Richard Bower, E. 4 G. 4.* 492

4. Where the charter of a corporation provided that, "when any one or more of the capital burgesses for the time being should die, or dwell without the borough, or be removed from his office, it should be lawful to the other capital burgesses at that time surviving and remaining, or the greater part of the same, of whom the mayor was to be one, to elect another, or to others of the burgesses of the said borough into the place or places of the capital burgess or burgesses then happening or to be," Held, that a majority of the entire body

of capital burgesses, and not merely of those then existing, must be present to make a good election under that clause. *The King v. Devonshire. The King v. Humphrey Williams, E. 4 G. 4.*

Page 609

COSTS.

1. A defendant was held to bail for a sum of money claimed to be due to the plaintiff for board and lodging, charged at the rate of 2l. 2s. per week: At the trial it was proved that the plaintiff had expressly agreed to charge at the rate of 1l. 1s. per week only, and a verdict was found for a sum less than that, for which the defendant was held to bail: A rule nisi having been obtained for allowing the defendant his costs under the 48 G. 3. c. 46. s. 3, the plaintiff, in answer thereto by his affidavit, denied that there was any such agreement, and swore that the whole sum claimed was justly due to him; under these circumstances, the Court acted upon the testimony given at the trial, and made the rule absolute. *Glenville v. Hutchins, M. 3 G. 4.* 91

2. Where a rule for a new trial is silent as to the costs of the first trial, and the cause is afterwards referred at Nisi Prius, and determined in favour of the plaintiff, he is not entitled to the costs of the first trial. *Summers v. Formby, M. 3 G. 4.* 100

3. A certiorari issued to remove a cause from the Court of Great Sessions in Wales, without any special ground for so doing, and without any notice having been given to the opposite party, but was not delivered to the judges of that Court till the day before the trial, and in consequence had taken place, and

and after great expences had been incurred, under these circumstances this Court not only quashed the certiorari, and directed a procedendo to issue, but ordered that the party who caused it to issue, should pay to the opposite party the costs incurred by the latter in the court below. *Jones v. Davies and Others*, M. 3 G. 4. Page 143

4. The office of register and clerk of the court of request, which was created by statute, in the city of Bristol, is not an office within the meaning of the 9 Anne, c. 20., and therefore judgment having been given for the defendant upon a quo warranto for using that office: Held, that he was not entitled to costs. *Rex v. Hall*, H. 3 & 4 G. 4. 237

5. Where there is reasonable ground for supposing that the evidence of a witness will be admissible, the master may allow his expences on taxation of costs against the other party. *Rushworth, Gent. v. Wilson*, H. 3 & 4 G. 4. 267

6. Where a sea-faring man remained in this country in order to give evidence in a cause: Held, that on taxation of costs, the master was justified in allowing him a subsistence from the service of the writ until the trial. *Berry v. Pratt*, H. 3 & 4 G. 4. 276

7. Where a cause and all matters in difference were referred to an arbitrator, but nothing was said about costs: Held, that the arbitrator had power over the costs of the cause, but not those of the reference. *Firth v. Robinson*, H. 3 & 4 G. 4. 277

8. In trespass for cutting down trees. Plea first, not guilty; second, justifying, because the trees obstructed a highway. Replication joined issue on plea of not guilty and denied the highway; and new assigned a cutting down trees extra

viam. Defendant joined issue on the special plea and suffered judgment by default on the new assignment. The jury having found a verdict for the defendant on the issue on the special plea, and assessed damages on the new assignment: it was held, that plaintiff was entitled to full costs, except upon the issue on the special plea, and that defendant was not entitled to costs even on that issue. *Longden v. Bourn*, H. 3 & 4 G. 4. Page 278.

9. An action for money had and received, brought against the receiver of an estate to recover money received by him for rent, for the purpose of trying the title of the estate, is an action for rent within the meaning of the 39 & 40 G. 3 c. 104. s. 13., the London Court of Request act; and the plaintiff, although he recovered less than 5l., was held to be entitled to costs. *Drew v. Fletcher*, H. 3 & 4 G. 4. 283

10. Where the lessor of the plaintiff having entered into the common rule to pay costs, died between the commission day and the trial, and the plaintiff was nonsuited on the merits; Held, that the executor of the lessor was not liable to pay the costs. *Doe dem. Pais. v. Grundy*, H. 3 & 4 G. 4. 284

11. On the 6th February, a rule to discontinue the action on payment of costs was obtained by the plaintiff. The costs were not taxed until the 11th March: Held, that when the costs were taxed, and the judgment of discontinuance entered up, it related back to the day when the rule for discontinuance was obtained, and that the action was to be considered discontinued from that time. *Brant v. Pasack*, E. 4 G. 4. 649

COURT COUNTY.

See ATTORNEY, 8.

COURT SUPERIOR.

See JURISDICTION.

COURT OF REQUESTS.

See COSTS, 4. 9.

COVENANT.

See FORFEITURE. VARIANCE, 6.

1. Covenant to save harmless certain premises against all actions, suits, claims, and demands whatsoever, both in law and equity, which might be made, commenced, or prosecuted by *H. W. P.*, or *T. B. W. P.* Breaches, 1st, That *H. W. P.* on, &c. at, &c., who then and there made a claim and demand, and claimed to have a right and title to the premises, entered and cut trees, &c., and procured the occupier to attorn to him. 2dly, That certain title deeds relating to the premises were withholden by one *A. W.*, at the instance, and through the claim and demand of *T. B. W. P.* Plea to first breach, that *H. W. P.* had no lawful claim or title to the premises; to second breach, similar plea as to *T. B. W. P.* Demurrer and joinder: Held, first, that *H. W. P.* and *T. B. W. P.* being named in the covenant, the indemnity extended to all claims made by them, whether upon lawful title or otherwise; and, secondly, that the acts upon which the breaches were assigned were claims in law within the meaning of the covenant. Query, whether the breaches would have been good in form, if specially demurred to. *Fowle, Executor of Woodman, v. Welsh, M. 3 G. 4.* Page 29
2. *A.* being seised in fee of a mill and of certain lands, granted a lease

of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, suits, and services; and also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill and the reversion of the demised premises to the same person: Held, that the reservation of the suit to the mill was in the nature of a rent, and that the implied covenant to render it resulting from the requirement, was a covenant that run with the land as long as the ownership of the mill and the demised premises belonged to the same person, and consequently, that the assignee of the lessor might take advantage of it. *Vygon v. Arthur, H. 3 & 4 G. 4.* Page 410

3. Covenant by the lessor, that the lessee should hold the premises without any lawful let, suit, interruption, eviction by the lessor, or by or through the lessor's acts, means, right, &c. The lessor held under a lease, for a longer term which contained a clause of re-entry by the original lessor, in case the premises should be used for a shop. The under lessee was not informed of this clause, and underlet to a tenant, who incurred a forfeiture by using the premises for a shop; and the original lessor evicted him: Held, that this was not an eviction by means of the lessor within the meaning of the covenant in the under-lease. *Spencer v. Marriott, H. 3 & 4 G.* 457
4. Declaration upon an indenture of apprenticeship for breach of a covenant, whereby the defendant, in consideration of a premium of 90*l.*, covenanted to instruct the apprentice in his trade, and provide him with diet, &c. Breach, that the defendant did not, after making the

the indenture, instruct the apprentice; but, on the contrary, refused so to do, and after the making of the indenture, to wit, on the 13th July, refused then or at any other time to instruct him; and that the defendant did not, after the making of the indenture, provide the apprentice with diet, &c. but, on the contrary thereof, on the 18th July, compelled him to quit his service before the expiration of the term. Pleas, as to the not instructing, and not providing with diet and lodging, before the 10th July, that he did instruct and provide him with diet and lodging till that time. Upon this plea issue was taken and joined. And as to this instructing, and not providing with diet and lodging, upon and after the 10th of July, that the defendant was ready and willing to instruct, and provide the apprentice with diet and lodging during the whole term; but that the apprentice would not, after making the indenture, serve the defendant, but frequently, and particularly on the 10th of July, refused so to do; and that, on the 10th day of July, the apprentice refused to do particular acts therein mentioned, which he was bound to do as such apprentice; and on the contrary thereof, against the positive orders of the defendant, absented and wholly withdrew himself from his service, declaring that he never intended to return again to his service, whereby defendant was prevented from instructing and providing him with diet and lodging according to the indenture. Replication, that after the apprentice had been guilty of the supposed breaches of duty as mentioned in the plea, to wit, on the 18th of July, he, the apprentice, returned to the defendant, and offered to serve him as such ap-

prentice during the residue of the term, and requested him to receive him, and provide him with diet and lodging, but that defendant refused so to do. Demurrer assigning for cause, that plaintiff had by his declaration complained of a continued breach of covenant in not instructing, &c. the apprentice, from the time of making the indenture till the commencement of the suit, and although the second plea answered to the whole time in the declaration after the 10th of July, yet that the plaintiffs had omitted to reply to such parts of defendant's second plea as related to not instructing, &c. the apprentice on the 10th of July, and between that time and the 13th of July. Held, that the plaintiffs claim was not entire but divisible, and covered every part of the time during which the master refused to instruct the apprentice, and consequently that there was no discontinuance: Held, also, that the replication was not a departure from the declaration, the gravamen of the complaint being, that the defendant had compelled the apprentice to quit his service, and the replication shewing the manner in which he had so done it; Held, also, that the covenants in an indenture of apprenticeship are independent covenants, and consequently, that acts of misconduct on the part of the apprentice stated in the plea, were not an answer to an action brought for breach of the covenant by the master, to instruct and maintain the apprentice during the term agreed upon by the indenture. *Winstone the Elder, and Winstone the Younger, v. Linn*, H. 3 & 4 G. 4. Page 460

5. Covenant by the reversioner against the assignee of the grantee. Declaration stated that A. and B. did grant licence for a term of years to C., to

C., to continue a channel open through the bank of a navigation; in order that the wastewater might pass through the channel to the mills of *C.*, the latter paying a certain annual sum therein mentioned. Breach, nonpayment of that annual sum. *Semble*, That upon the face of the declaration *A.* and *B.* must be considered as having the sole ownership of the navigation, and the sole power of granting this privilege; and, in that case, that the deed would operate as the grant of an interest in an hereditament, and that the assignee of the grantee would be liable to an action by the reversioner within the statute 32 Hen. 8. By the deed produced in evidence, *A.* and *B.* were described as persons having the greatest proportion or share in the profits of the navigation: Held, by this deed it appeared, that the grantors had not the power of granting the privilege of which the deed, as set out in the declaration, purported to be a grant, and therefore that there was a variance.

Held, also, that the deed shewed that the assignee of the grantee was not bound by the covenants, inasmuch as it appeared that the grantors had not any legal or equitable estate in a real hereditament. *The Earl of Portmore v. Bunn, E. 4 G. 4.* Page 694

CUSTOM.

See COPYHOLD, 8.

1. In the manor of *A.* there is a custom that, when a copyhold tenement is granted by copy of court roll to any person to hold the same to such person for the lives of two or more other persons, and the life of the longest liver of such other persons successively, and the grantee dies during the life or lives of any one or more of such other

persons, without having devised the said copyhold tenement, such other person or persons shall be entitled, by virtue of such grant, to take and hold the copyhold tenement successively, as they are respectively named in the grant, during his or their life or lives respectively; but if the grantee devises the copyhold tenement, the devisee shall take and hold it during the life or lives of the cestui que vies: Held, that this was a good custom. *Doe dem. Nepean, Bart., v. Goddard, E. 4 G. 4.* Page 822

DEBT.

See BILL OF EXCHANGE, 7. PLEADING, 25.

DECLARATION.

See PRACTICE, 36.

DEED.

See ASSUMPSIT, 5. EVIDENCE, 18.

DEMAND OF POSSESSION.

See EJECTMENT, 5. LESSOR AND LESSEE, 2.

DEMURRER.

See PLEADING, 5. VARIANCE, 6.

DEPARTURE.

See COVENANT, 4.

DESCENT.

See COPYHOLD, 1.

DEVISE.

12. A testator devised to trustees, in trust for his only son, all his freehold and copyhold lands to be transferred to him as soon as he should attain to twenty-one years of age; but in case he should die before he attained to the age of twenty-one years, then to A. B., his heirs and assigns: Held, that the trustees took in the copyhold lands an estate for years, determinable on the son's attaining the age of twenty-one years, or by his death before that period. *Doe dem. Player v. Nicholls*, H. 3 & 4 G. 4.

Page 336

13. A. being the owner of an estate called D., with a mansion-house upon it, in which he resided, purchased an adjoining estate, and occupied a part of it himself, together with the D. estate, having removed some of the fences by which they had been separated; and afterwards devised to his widow for life "all and singular his mansion-house in which he then lived, called D., together with all buildings and lands thereunto belonging, as then enjoyed by him; and after her decease, all his said mansion-house called D., with the lands thereto belonging, with the appurtenances, to his godson J. S. B., his heirs and assigns for ever:" Held, that the widow took an estate for life in that part of the newly-purchased estate which the testator occupied himself, as well as in the old D. estate; and that J. S. B. took a remainder in fee in all that was given to the widow for life. *Bodenham v. Prichard*, H. 3 & 4 G. 4. 350

14. A testator devised to his two daughters E. F. and A. M. certain lands therein described, to be equally divided between them at the time of his decease, and at the time of the death of either daughter, her share of the land was to

be equally divided between her children; but if his daughter A. M. died without issue, then her share of the land was to go to his daughter E. F., and at her decease to her children, share and share alike; and all the residue of his real estate he devised to his son; but if he died without issue, then the son's share of the real estate was to go to all the testator's grandchildren that should be then living, share and share alike. And he further directed that such share of such lands as he had bequeathed to his daughters E. F. and A. M., and likewise such shares of such money as might happen to become due by virtue of his will, to his grandson and granddaughter R. and H. F., the children of E. F., should be placed in the hands of their brother J. F., his heirs and assigns; and the rents, issues and profits of such share of lands, and the interest for such share of money, to be paid to them during their natural lives, and after their decease to be equally divided among his or her children if any, if not, to become the property of his or her heirs or assigns for ever; nevertheless that J. F. might, if he thought fit, deliver up or pay to the said R. F. at any prior period, all or any part of his share, for his maintenance or advancement in the world, unto the only proper use of R. F., his heirs and assigns for ever: Held, that the children of E. F. took a fee. *Doe dem. Orpe v. Frost*, E. 4 G. 4.

Page 688

4. A., by will, charged his real estates with the payment of his debts and funeral expenses, and subject thereto, devised the same to trustees in trust, to permit two persons, therein mentioned, to receive two annuities out of the rents and profits of the premises; and subject to the said annuities he devised

vised the same to the trustees, their heirs and assigns, until his nephew *J. W.* should attain the age of twenty-one years; and if he should die in the mean time, until his nephew *H. W.* should attain the age of twenty-one years; and if he should die in the mean time, until his niece *M. W.* should arrive at that age, upon the uses, trusts, and purposes therein declared concerning the same; viz. that the trustees should raise out of the rents and profits, by sale or mortgage, a sum sufficient to pay his debts, funeral expenses and legacies; and then that they should apply a proper sum out of the rents and profits of the premises, for the maintenance and education of his nephew *J. W.*, until he should arrive at the age of twenty-one years; and when he arrived at that age, then upon trust, to pay him the rents and profits of the premises, if any should remain in their hands after payment of debts, &c.; and if *J. W.* should happen to die before he attained twenty-one years, then upon trust to apply a sufficient sum arising out of the rents and profits, for the maintenance and education of his nephew *H. W.* till he should attain the age of twenty-one years; and when he should arrive at that age, then upon trust to pay him the residue of the rents and profits, if any should remain in their hands, after payment of debts, legacies, &c., and in the mean time to place out that interest the rents and profits arising from the estate for their benefit; and when and as soon as the said *J. W.* should attain the age of twenty-one years, or in case of his death, when and as soon as the said *H. W.* should arrive at that age, or in case of his death, when and as soon as the testator's niece *M. W.* should arrive at the age of twenty-one years, he devised his real estate, subject as aforesaid, to

the said trustees, their heirs and assigns, to and upon the uses, intents, and purposes as thereafter declared concerning the same, viz. to his nephew *J. W.* and his heirs and assigns for life; and after the determination of that estate, to the use of the trustees, their heirs and assigns, for the life of *J. W.* in trust to preserve contingent remainders, yet to permit the said *J. W.* and his assigns to receive the rents and profits for his own use during his life; and immediately after the decease of the said *J. W.* to his first and other daughters in tail male, and for default of such issue to the use of his nephew *H. W.*, and his assigns for life; and after the determination of that estate to the trustees, for his life, to preserve contingent remainders; and after the decease of the said *H. W.*, to the use of his first and other sons and daughters in tail male; and in default of such issue, to the use of his niece, *M. W.* for life; and after her decease, to the use of her first and other sons and daughters in tail male; and in default of such issue, to the use of his sister, her heirs and assigns for ever. *J. W.* having survived the testator, died before he attained the age of twenty-one years, leaving a daughter surviving him. *H. W.* attained the age of twenty-one years: Held, first, that under this will, the trustees took only a chattel interest in the estates devised to them.

Secondly, that *J. W.* took a vested estate for life.

Thirdly, that his daughter took an estate in tail male on the death of her father.

Fourthly, that *H. W.* took at the testator's death a vested estate for life, in remainder, expectant on the death of his brother *J. W.*, and failure of his children and their issue male. *Walter v. Rutledge*, 1 E. 4 G. 4, Page 721

DISCONTINUANCE OF ACTION.

See COSTS, 11. COVENANT, 4.
PLEADING, 20.

DISCONTINUANCE OF ESTATE.

By marriage settlement certain premises were conveyed to trustees and their heirs and assigns, to the use of the father and mother of the intended husband, for their lives and the life of the survivor; remainder to the use of the intended husband and wife, and their assigns, for their joint lives and the life of the survivor; remainder to the use of the trustees, to preserve contingent remainders during the life of the intended husband and wife, and the survivor; remainder to the use of the heirs of the husband, by his intended wife: Held, that, under this deed, the husband took an estate for life, and an estate tail in remainder, and consequently that he could not, when in possession of his life estate, discontinue the estate tail by granting a lease for lives with livery of seisin. For discontinuance can be made only by tenant in tail in possession. *Doe dem. David Jones and Others v. H. Jones, H. 3 & 4 G. 4.* Page 238

DISTRESS.

See ACTION ON THE CASE. BANKRUPT, 12. LANDLORD AND TENANT, 3. INCLOSURE ACT, 4.

Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings: Held, that his goods in that house not being necessary for the convenience of the ambassador, were liable to be distrained for poor-

See *Napello v. Taggert, E. 4 G. 4.* Page 554
See *Pence, 1 INCLOSURE ACT, 2.*

ECCLESIASTICAL COURT.

The Ecclesiastical Court has no jurisdiction over trusts, and therefore, where a party, sued as a trustee, was arrested on a writ de contumace capiendo, this court discharged him out of custody. *Ex parte Thomas Jenkins, E. 4 G. 4.* 655

EJECTMENT.

1. Where a plaintiff in ejectment has been nonsuited, the defendant not having appeared to confess lease, entry, and ouster, judgment may be regularly signed on the first day of the ensuing term, and a writ of possession issued on the same day, although the possee be not delivered over at the time by the associate to the attorney for the plaintiff. *Doe dem. Davies and Wife v. Roe, M. 3 G. 4.* 118
2. A party having been prevented from suing out execution in an ejectment by an injunction in Chancery, which continued in force for many years, during which the term in the declaration in ejectment expired, the Court would not permit it to be enlarged unless it were quite clear that the amendment would work no injustice to the opposite party. *Brady v. Another v. Hasselden, M. 3 G. 4.* 121
3. A certiorari will lie to remove an ejectment from an inferior court. *Doe dem. Sadler v. Dring, H. 3 & 4 G. 4.* 253
4. Where the lessor of the plaintiff having entered into the common rule

Rule 1000. Costs, used between the commission-day and the trial, and the plaintiff was nonsuited on the merits: Held, that the executor of the lessor was not liable to pay the costs. *Doc dem. Pain v. Grundy, H. 3 & 4 G. 4. Page 284*

5. Where an agreement was made between A. and B. that the former should sell certain premises to B., it turned out that he had a title to them, and that B. should have the possession from the date of that agreement: Held, that an ejectment could not be maintained by A. against B. without a demand of possession, although the object of the action was to try the title to the premises. *Doc dem. Newby v. Jackson, H. 3 & 4 G. 4. 448*

ELECTION.

See Bribery Act, 1. CORPORATIONS, 3. 4.

EMANCIPATION.

A slave, having enlisted into the army, was discharged from that service, and returned to his father's family before he attained the age of twenty-one years: Held, that he was not emancipated. *The King v. The Inhabitants of Rotherfield Greys, Oson, H. 3 & 4 G. 4. 845*

ENFRANCHISEMENT.

See Copyhold, 1.

EQUITABLE ESTATE.

See Settlement by Deed, 1; 2.

181

ERROR.

See Bond, 1. Breach, 25, 22.

H. 3 & 4 G. 4. 222

ESTATE TAIE.

See Discontinuance of Estate, 1.

See Lease, 2.

TO EVIDENCE

EVICTIO.

See COVENANT, 3. LEASE, 5.

TO EVIDENCE

1. Declaration stated, that the defendant, at Dublin, made a promissory note, and thereby promised to pay the same at Dublin, without alleging it to be at Dublin in Ireland: Held, that upon this declaration the promissory note must be taken to have been drawn in England for English money, and therefore, that proof of a note made payable at Dublin in Ireland, for the same sum in Irish money, did not support the declaration. *Sproule v. Legge, M. 3 G. 4. Page 16*

2. Declaration, in consideration that plaintiff would procure A. B. to grant a lease to defendant; the latter promised to pay the plaintiff 170*l*. The proof was, that A. B. having agreed to grant a lease to the plaintiff, the latter undertook, originally, to assign it to defendant for the consideration mentioned; but that afterwards, a lease to which plaintiff was a party and assented, was granted immediately by A. B. to the defendant. The consideration to be paid by the defendant to the plaintiff was not mentioned in that lease: Held, first, that the lease was not void on account of this omission, the ad valorem duty imposed by the 50 G. 3. c. 184. applying only to considerations passing between lessor and lessee; and, secondly, that the evidence proved, the substitution of a new contract to procure a lease from A. B. to the defendant in lieu of the original contract, and that there was not any variance. *Brown v. Mitchell, M. 3 G. 4. 188*

3. Where a court stated that A. B. supplied the poor of the parish of 3 F. W. with

W. with provisions, and the evidence was, that he supplied the poor of the parish of *W.* and other parishes in a workhouse: Held, first, that it was no variance, the proof being larger than the allegation; secondly, that the objection as to a variance between the allegation of a supply of the poor and the proof of a supply in the workhouse, not being taken at nisi prius, could not be afterwards available. *West v. Andrews*, *M.* 3 G. 4.

Page 77

4. Where a plaintiff, in an action for goods sold and delivered, proved the possession of the goods by himself, and their removal by the defendants; and it appeared that the goods consisted of spar lying on the lands of *A.*, and that the plaintiff claimed under *A.*, by a written agreement not produced: Held, that this was not sufficient proof of title to the goods from which a contract between the parties could be implied. *Lee v. Shore and Others*, *M.* 3 G. 4. 94

5. Where the declaration stated that a bill of exchange was indorsed by certain persons trading under the firm of *H.* and *F.* by procuration of *J. D.*: Held, that this allegation was supported by evidence of *J. D.*'s hand-writing, and that he being the managing partner in a firm which carried on all business of buying and selling, under the designation of *H.* and *Co.*, was in the habit of indorsing bills in the manner above stated: although there was no such person as *F.* in the firm of *H.* and *Co.*, and no direct proof that *J. D.*'s partners were privy to those transactions. One partner may act for the whole firm by procuration. *Williamson v. Johnson*, *H.* 3 & 4 G. 4. 146

6. Where a bill of exchange was indorsed generally, but delivered to *S. C.*, as administratrix of *J. C.*,

for a debt due to the intestate, and *S. C.* died intestate, after the bill became due, and before it was paid: Held, that the administrators de bonis non of *J. C.* might sue upon the bill; and that their title was sufficiently proved by the letters of administration de bonis non, without producing those granted to *S. C.*, the administratrix.

Defendant having pleaded an agreement made between the plaintiffs and other creditors of the defendant, of the one part, and defendants of the other part, that the defendant should assign certain credits and effects to two persons upon certain trusts, and that plaintiffs agreed to accept those conditions in discharge of their demand, provided all the creditors assented; that defendant did assign, and that all the creditors assented. The replication denied that all the creditors assented: Held, that the affirmative of the issue being on the defendant, he was bound to prove the assent of all his creditors.

Semble. That he was bound to prove the assent of the plaintiffs as well as that of his other creditors. *Catherwood and Another, Administrators, v. Chabaud*, *H.* 3 & 4 G. 4. Page 150

7. *A.* consigned goods for sale to *B.*, the captain of an Indiaman bound on a voyage to Calcutta, and directed him to invest the proceeds in certain specified articles, or in bills at the exchange of the day. *B.* sold the goods at Calcutta, and invested the proceeds in sugar, which was not one of the articles specified in his instructions, and informed *A.* of the purchase by a letter, which the latter received on the 29th May. *B.* had no commercial establishment in this country, but, by a memorandum on a promissory note given by him

to

to *A.* before he sailed for *India*, it appeared that one *C.* had acted as his agent in some insurance transactions. On the 7th August *A.* notified to *C.* that he would not accept the sugars, and advised the latter to insure them. *C.* declined to interfere, alleging that he had no knowledge of any transactions between *A.* and *B.*: Held, upon these facts, in an action brought by *A.* to recover the proceeds of the goods shipped by him; that the jury were well warranted in finding that *A.* had assented to the purchase made by *B.* *Prince v. Clark*, *H. 3 & 4 G. 4.* Page 186

8. In an action by the indorsee against the drawer of a bill of exchange, the plaintiff did not prove any notice of dishonour to the defendant, but gave in evidence an agreement made between a prior indorser and the drawer after the bill became due. It recited that the defendant had drawn, among others, the bill in question, that it was over due, and ought to be in the hands of the prior indorser, and that it was agreed that the latter should take the money due to him upon the bill by instalments: Held, that this was evidence that the drawer was at that time liable to pay the bill, and dispensed with other proof of notice of dishonour. *Gunsan and Others, Assignees, v. Metz*. *H. 3 & 4 G. 4.* 1893

9. By an act of the 16 & 17 Car. 2., certain persons were authorised to make navigable the river *Itchin*, and certain other rivers, and to cut, dig, and make new channels, and to deepen or widen the rivers, channels, &c., and to do all that might be fit for navigation, and to build locks, &c. upon any of the lands adjoining the rivers, &c., and to make towing-paths: and it was expressly provided that the undertakers of the navigation should not

make any trench, river, or water-course, or use the locks, &c., upon the land of any person until a full agreement with, and satisfaction to the owners of the land had been made by the commissioners appointed by the act, or by the persons authorised to make the navigation, nor until satisfaction should be paid to the respective owners of the lands, according to the determination of the commissioners, or by agreement by the undertakers of the navigation. By a subsequent clause, the commissioners were to determine what satisfaction any person should have in respect of any prejudice, loss, or damage sustained for such proportion of his lands next adjoining to the navigation as should be made use of for the purposes of the act, in case the undertakers of the navigation should not have agreed beforehand, and satisfied the party so damaged. The proprietor of the navigation having brought trespass against the owner of the adjoining land, for cutting trees upon the bank of a channel made under this act, the learned Judge at the trial admitted evidence of acts of ownership exercised by the proprietors of the navigation upon other parts of the banks where the adjoining land did not belong to the defendant, and afterwards left the question to the jury, upon conflicting acts of ownership which were given in evidence; but stated in the course of his address, that it might be assumed, from the length of time that had elapsed since the passing of the act, and from the provision that no land of any person was to be used until satisfaction was made to the owner, that some agreement had been made, by which all the land used for the purposes of the navigation by the proprietors thereof had been sold to them by the

land-owners. A rule having been obtained for a new trial, the Court held, first, that by virtue of the provisions of this act, of the 16 & 17 Car. 2., the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to and formed out of the earth excavated from a new channel, made for the first time under the act, as would enable them to maintain trespass. Secondly, that as the purchase of the soil was not necessary for any of the purposes of the act, it was to be inferred that no such purchase had actually been made, and that the improbability of any such purchase ought to have been presented to the jury. Thirdly, that acts of ownership by the proprietor of the navigation upon different parts of the bank contiguous to new channels of the navigation made under the act of parliament were not admissible in evidence to shew that the soil in the bank in question belonged to the proprietor of the navigation; and the rule for a new trial was made absolute. *Hollis v. Goldfinch and Others*, H. 3 & 4 G. 4.

Page 205

10. Where an action was brought against A. and B., and C. his wife, upon a joint promissory note, made by A. and C. before her marriage, and the promise was laid by A. and C. before her marriage, and defendants pleaded the statute of limitations, whereupon issue was joined: Held, that an acknowledgment of the note by A. within six years, but after the intermarriage of B. and C., was not evidence to support the issue. *Pittam v. Foster*, H. 3 & 4 G. 4.

248

11. An ambiguous expression in a declaration is cured by verdict, and must afterwards be taken to have been used in that sense, which would sustain the verdict. *Lord*

Huntingtower, v. Gardiner, H. 3 & 4 G. 4. Page 297

12. In an action by the assignees of a bankrupt, brought to recover property in the bankrupt's possession, as reputed owner, the plaintiffs proved that the bankrupt had once been the real owner of the goods in question, and that he continued in possession of them until he committed an act of bankruptcy: Held, that this was *prima facie* evidence that he continued in possession as owner, and that it then lay upon the defendant to prove that the bankrupt had ceased to be the reputed owner. The defendant proved that, long before the act of bankruptcy, the goods had been seized under an execution, at the suit of a creditor, by the sheriff, and that they were conveyed by bill of sale to the creditor, and that he afterwards demised them at an annual rent to the bankrupt, who continued in possession of them till the time of his bankruptcy. Soon after the bill of sale was executed, the creditor's initials were marked on all the goods: Held, that this was no evidence of the notoriety of the change of property; and, consequently, that there was no evidence to go to the jury that the bankrupt had ever ceased to be the reputed owner. *Lingard and Another, Assignees of Fry, v. Messiter*, H. 3 & 4 G. 4.

308

18. In an action on the 9 Anne, c. 14., brought by the assignee of a bankrupt to recover money lost by the bankrupt at play, the bankrupt, who had obtained his certificate, was called as a witness to prove the loss: Held, that he was incompetent, but that his competency was restored by three releases; first, by the bankrupt to the assignee; second, by all the creditors to the bankrupt; third, by the assignee

assignee (who was not a creditor) to the bankrupt: Held, secondly, that a year after the commission issued, it might be presumed that all the creditors had proved, and that a release signed by all those who had proved might therefore be considered as a release by all the creditors; thirdly, that such a release did not destroy the assignee's right of action. *Carter, Assignee, v. Abbott and Others*, H. 3 & 4 G. 4.

Page 444

14. In an action against an underwriter upon goods which sustained sea damage: Held, that although the defendant was a subscriber to *Lloyd's*, a certificate granted by their agent resident abroad, was not admissible to prove the amount of the damage. *Drake v. Marryat*, E. 4. G. 4.

473

15. In trespass quare clausum fregit, where the plaintiff names the close in his declaration, and the defendant pleads *liberum tenementum* generally, without giving any further description of the close, the plaintiff is not driven to a new assignment, but is entitled to recover, upon proving a trespass done in a close in his possession, bearing the name given in the declaration, although the defendant may have a close in the same parish known by the same name. *Cocker v. Crompton and Others*, E. 4 G. 4.

489

16. Declaration in replevin for taking the growing corn of the plaintiff. Avowry, that plaintiff and one J. B. held the locus in quo, as tenants to the defendant, at a money rent, and because it was in arrear, defendant took the corn as a distress. Plea in bar, denying the tenancy *modo et forma*, and issue joined thereon. At the trial some evidence was given by the defendant that the plaintiff and J. B. were in possession of the premises in ques-

tion: that a lease had been executed to them by the defendant's ancestor, which plaintiff and J. B. had paid for; but which they had refused to execute. It was not proved that J. B. was so connected with the plaintiff as to the premises in question as to be jointly liable for the rent; nor was it shewn that the corn was the joint property of the plaintiff and J. B.: The plaintiff gave evidence to shew that the holding was under an agreement for a corn rent, and in support of that case he tendered J. B. as witness. He was rejected without being examined on the voir dire as to his liability to the rent or not: Held, that he was not an incompetent witness until that fact was established, and, therefore, that he was improperly rejected. *Bunter v. Warre*, E. 4 G. 4.

Page 689

17. Covenant by the reversioner against the assignee of the grantee. Declaration stated that A. and B. did grant licence for a term of years to C., to continue a channel open through the bank of a navigation, in order that the waste water might pass through the channel to the mills of C., the latter paying a certain annual sum therein mentioned. Breach, nonpayment of that annual sum. Semble, that upon the face of the declaration A. and B. must be considered as having the sole ownership of the navigation, and the sole power of granting this privilege; and, in that case, that the deed would operate as the grant of an interest in an hereditament, and that the assignee of the grantee would be liable to an action by the reversioner within the statute 32 Hen. 8. By the deed produced in evidence A. and B. were described as persons having the greatest proportion of share in the profits of the navigation; Held, that by this deed it appeared, that

the grantors had not the power of granting the privilege of which the deed, as set out in the declaration, purported to be a grant, and, therefore, that there was a variance.

Held, also, that the deed shewed that the assignee of the grantee was not bound by the covenants, inasmuch as it appeared that the grantors had not any legal or equitable estate in an hereditament. *The Earl of Portmore v. Bunn*, E. 4 G. 4. Page 694

16. Declaration that defendant was indebted to plaintiff in account, and thereupon, in consideration of the promises, and that plaintiff would take and accept the work and labour of the defendant, as a plumber and glazier, at reasonable prices, to the extent of that debt, defendant promised to do the work. Counts for money had and received, &c. It was proved, that the plaintiff, by deed, had assigned certain premises to the defendant for a sum of money therein mentioned. The deed stated that sum to have been well and truly paid and released the defendant therefrom. Parol evidence was given to shew that in fact part of the purchase-money had not been paid, but that it was agreed by parol between the parties, at the time of the execution of the deed, that that part of the purchase-money should be retained by the defendant, and that he should do work for the plaintiff to that amount: Held, that if this evidence was admissible, still it did not support the declaration. Held, secondly, that assuming the legal effect of the agreement to be, that the entire consideration-money had been paid, and that part was returned, in consideration of the defendant's promising to do work, the parol evidence would not contradict the deed, and would be admissible;

but that inasmuch as the original debt was extinguished, by the release in the deeds, and no new debt was created, but merely an obligation to do work, arising out of a new special contract, that ought to have been declared upon. *Baker v. Dewey*, E. 4 G. 4.

Page 704

EXAMINATION.

See PRISONER.

EXECUTION.

See PRACTICE, 3, 25. 32. VENDOR AND VENDEE, 6.

EXECUTOR.

See ADMINISTRATOR. COSTS, 10. EJECTMENT, 4. VARIANCE, 4.

FENCE.

By an inclosure act it was enacted that the allotments in lieu of tithes should be inclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed lands, or be bounded by any river or other sufficient fence in the judgment of the commissioners. A ditch which had been immemorially the only boundary between the common and adjoining townships, is a fence within the meaning of the act. *Ellis v. Arnison*, M. 3 G. 4. 70

FELONY.

See PRISONER, 1. JUSTICES, 3.

FIERI FACIAS.

See VENDOR AND VENDEE, 6.

FINE

FINE

See Custom, 2. COPYHOLD, 2.
MANDAMUS, 2.

Mandamus to the lord and steward of the manor of M. and P. to hold a court, and accept a surrender of a piece of copyhold land from A. and his wife, and admit B. Return — that there is a custom within the said manor, that if any person, not before being a customary tenant, or not being resident within the manor, takes any interest as a purchaser by surrender or otherwise of any lands, &c. within the manor, he shall pay for his fine on admission as he and the lord can agree, which is usually assessed at two years' value; but persons already being customary tenants or resident within the manor, pay another and a smaller fine to the lord upon so taking any such interest. That B. having purchased the equity of redemption of a customary estate of considerable value; afterwards, and before he was admitted to that estate, purchased the land in question, being a small customary estate, in order to be admitted to that first, and so elude the payment of the larger fine, whenever he should apply to be admitted to the larger estate, and by that means to defraud the lord of his said fine. Upon exceptions: Held, that the return was bad, for that B. might lawfully make such second purchase in order to avail himself of the custom in favour of tenants of the manor.

Semble, that if the second purchase were fraudulent, still the purchaser would be entitled to admittance, but would not be thereby enabled to avail himself of the custom. *The King v. Boughcy, Bart.*, E. 4 G. 4. Page 565

FRAUDS, STATUTE OF. 799

FOREIGN PROMISSORY NOTE.

See PROMISSORY NOTE, 2.

FORFEITURE.

Lessee covenanted that he would not do any act, matter, or thing upon the demised premises, which might be, grow, or lead to the damage, annoyance, or disturbance of the lessor, or any of his tenants, or to any part of the neighbourhood; and the proviso for the re-entry, was, that the lessee should not permit any person to inhabit the premises who should carry on certain specified trades or businesses, (that of a licensed victualler, not being one of those,) or any other business that might be, or grow, or lead to be offensive, or any annoyance, or disturbance to any of the lessor's tenants: Held, that the opening of a public-house upon the premises was not a breach of the covenant or proviso. *Jones v. Thorne*, E. 4 G. 4. Page 715

FRAUDS, STATUTE OF.

The traveller of A. and Co. in London, having called upon B. in the country for orders, B. gave him absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye at a certain price; the traveller said the price was too low, but that he would write to his principals, and if B. did not hear from them in one or two days, he might consider that his offer was accepted. A. and Co. never wrote to B., but sent all the goods: Held, that this was not a joint order for them all so as to make the acceptance of the cream of tartar the acceptance of the lac dye also, within 29 Car. 2. c. 3. s. 17. *Price and Others v. Lea*, H. 3 & 4 G. 4. Page 156

FRAUDULENT PREFERENCE.

See BANKRUPT, 1.

GAME.

See CONVICTION, 2.

GAMING.

The keeping of a common gaming-house, and for lucre and gain, unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called "Rouge et Noir," and permitting the said idle and evil-disposed persons to remain playing at the said game for divers large and excessive sums of money, is an indictable offence at common law.

See *Semble*, That an indictment would be good, merely charging the defendant with keeping a common gaming-house. Per *Holroyd J.* *Res. v. Rogier and Humphrey*, H. 3 & 4 G. 4. Page 272

GUARANTY.

See BILL OF EXCHANGE, 1.

GUARDIAN.

See POOR.

HABEAS CORPUS.

1. Where persons detained, without any warrant on board one of his majesty's ships of war, on a charge of smuggling, and on suspicion of murder, were brought up by writs of habeas corpus, and it appeared by the return to those writs, and in a certificate which issued at the same time, that the prisoners might be guilty of the offences

imputed to them, the Court refused to discharge them out of custody, and committed them to the custody of the marshal, in order that they might be taken before some incompetent authority to be examined, touching the matters contained in the returns; and to be further dealt with according to law. *Esparte Krans and Others*, H. 3 & 4 G. 4. Page 258

2. A cause cannot be removed from an inferior court by habeas corpus unless the defendant is actually or virtually in custody. *Mitchell v. Mitcheson*, H. 3 & 4 G. 4. 513

HIGHWAY.

1. An order of justices for diverting a highway stated that the new road was to pass through the lands of the late T. J., and that the justices had received evidence of the consent of the said T. J. in his lifetime: Held, that this order was bad, because it did not thereby appear that T. J. was the owner of the estate at the time when the order was made, *The King v. Kirk*, M. 3 G. 4. 185

2. Quere, Whether a parson, who lets his tithes from year to year to the occupiers of the lands respectively whereon they are produced, is liable to be rated to the repair of the highways. *The King v. The Justices of Buckinghamshire*, E. 4 G. 4.

3. By the 55 G. 3. c. 68. s. 2. when a footway, &c. is diverted by an order of justices, three descriptions of notice are to be given, and the order is to be confirmed and enrolled at the quarter sessions held next after the expiration of four weeks from the first day of giving such notice: Held, that the computation must be made from the first

of first day of giving that description of notice which is last published : Held also, that an assent to the turning of the road, given under the hand and seal of an agent of the party through whose ground the new road is to pass, is insufficient. *The King v. The Justices of Kent*, E. 4 G. 4. Page 622

HOUSE-HOLDER.

1. Where A., carrying on trade in partnership with others, had a dwelling-house, and counting-house attached to it in B., the counting-house being used by the different partners, who daily resorted thither for the purposes of their trade, and the dwelling-house being occupied by a clerk or servant of the firm, paid by them, as were also the rates, taxes, &c. : Held, that A. and each of his partners was a householder in B. within 26 G. 3. c. 38. s. 8., although neither he nor they actually resided with their families in B.

So, also, where the dwelling-house was occupied by one of the partners rent-free, and the taxes, &c. paid by the firm. *The King v. Hall*, M. 3 G. 4. 123

2. A. B. and C., carrying on trade in partnership, had a dwelling-house, yard, and premises in a parish in London; all the partners were in the habit of frequenting the premises daily for the purpose of business, but none of them resided there. The dwelling-house was inhabited by a clerk, who managed the business for them, but the rent, rates, and taxes, were paid by the firm : Held, that each of the partners was a householder within the 48 Eliz. c. 2., and liable to serve the office of overseer. *Rex v. Poynder, sen.* H. 8 & 4 G. 4. 178

HUNDRED, ACTION
AGAINST.

By 9 G. 1. c. 22. s. 7. the inhabitants of the hundred are to make satisfaction for damages occasioned by the acts therein mentioned : Held, that under this statute, the action must be against all the inhabitants of the hundred ; and the declaration being against two only, it was held bad on motion in arrest of judgment. *Jackson v. Bearton and Squirrel*, H. 3 & 4 G. 4. 176

Page 304

INCLOSURE ACT.

1. A clause in a private inclosure act, declaring that no item or charge in the accounts of the commissioners shall be binding on the parties concerned, or valid in law, unless the same shall have been duly allowed by a justice of peace in the manner therein pointed out, does not take away an appeal given by a subsequent clause to the party grieved by any thing done in pursuance of that or the general inclosure act, (other than and except such determinations as were by that or the general inclosure act declared to be binding, final, and conclusive,) the allowance of the accounts by a justice not falling within this exception. *Rex v. Justices of Cumberland*, M. 3 G. 4. 64

2. By an inclosure act it was enacted that the allotments in lieu of tithes should be inclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed land, or be bounded by any river or other sufficient fence in the judgment of the commissioners. A ditch, which had been immemorially the only boundary between the common

common and adjoining townships, is a
 fence within the meaning of the
 act. *Ellis v. Arneson*, *M. S. G. 4.*

Page 70

80. A private act of parliament, for
 inclosing the waste lands of a manor,
 reserved to the lord and his assigns,
 all mines, &c., together with all convenient and necessary
 ways, &c., then already made, or
 thereafter to be made, and liberty
 of laying waggon-ways, &c. at his
 and their free will and pleasure,
 and to do all such other works,
 acts, and things as might be neces-
 sary or convenient for the full and
 complete enjoyment thereof, in as
 full, simple, and beneficial a man-
 ner as if that act had not been
 made. An action of trespass hav-
 ing been brought against the lord's
 assignee for laying a waggon-way
 over one of the allotments in an
 improper direction and manner, it
 was held, that the real question to
 be decided by the jury was, whe-
 ther the waggon-way had been
 laid in such a direction as a person
 of reasonable skill would have se-
 lected; and whether the mode
 adopted was such as a prudent per-
 son would have adopted if he had
 been making the road over his
 own land, and not over the land of
 another. *Abson v. Fenton and
 Another*, *H. 3 & 4 G. 4.* 195

81. An enclosure act directed, that,
 in lieu of tithes, a corn rent should
 be payable to the impropriator and
 vicar by the person having the
 possession and occupation of the
 lands. Part of the lands enclosed
 were uns cultivated and untenanted
 for some years, during which time
 the owner lived on another estate.
 He afterwards demised them to a
 tenant, who entered and occupied:
 Held, first, that the corn rents were
 due for the time during which the
 land was unproductive; and, se-
 condly, that during that time the

landlord was liable for the posses-
 sion of the lands so as to be liable
 to the burdens imposed by the
 statute, and that the tenant coming
 in under him was liable to be dis-
 trained upon for the arrear of rent.
Newling v. Pearse, *H. 3 & 4 G. 4.*

Page 437

INDICTMENT.

1. The Court will not grant a cer-
 tiorari to remove an indictment
 from the quarter sessions after
 judgment has been pronounced in
 that court. *Rex v. The Inhabitants
 of Pennegoes and Mackgulleth*, *M.
 S. G. 4.* 14.
2. The keeping of a common gaming-
 house, and for lucre and gain,
 unlawfully causing and procuring
 divers idle and evil-disposed per-
 sons to frequent and come to
 play together at a game called
 "Rouge et Noir," and permitting
 the said idle and evil-disposed per-
 sons to remain playing at the said
 game for divers large and excessive
 sums of money, is an indictable
 offence at common law. *Seemle*,
 that an indictment would be good
 merely charging the defendant
 with keeping a common gaming-
 house. Per *Holroyd J.* *Rex v.
 Rogier and Humphrey*, *H. 3 & 4
 G. 4.* 272
3. Upon a conviction at the Chester
 assizes for perjury, the following
 entry was made upon the record:
 "It is therefore ordered that the
 said L. K. be transported to, &c.,
 for and during the term of seven
 years." Upon error, Held, that
 the entry was merely an order, and
 not a judgment; and a *procedendo*
 was awarded, commanding the
 court below to proceed to give
 judgment.
 The prisoner was, in the mean
 time, admitted to bail. *The King
 v. Kenworthy*, *E. 4 G. 4.* 711

INDORSEMENT.

See PROMISSORY NOTE, 3.

INDORSER AND INDORSEE.

See PROMISSORY NOTE, 3.

INFERIOR COURT.

See HABEAS CORPUS, 2.

INJUNCTION.

See PRACTICE, 11.

INSURANCE.

1. In an action against an underwriter upon goods which sustained sea-damage: Held, that although the defendant was a subscriber to *Lloyd's*, a certificate granted by their agent, resident abroad, was not admissible to prove the amount of the damage. *Drake v. Marryat*, E. 4 G. 4. Page 473
2. A. sold goods to B., at whose risk they were shipped for *Lisbon*, to be paid for by bills drawn upon R. and Co. C. went as supercargo and trustee for A. and B., and was to retain possession of the goods until the amount of the bills drawn upon R. and Co. was remitted, and then the bill of lading was to be delivered up to B. B. directed R. and Co. to effect an insurance, which was done at his expense, and not in pursuance of any agreement between him and A. The ship, with the goods on board, was captured, and the underwriters paid a total loss to R. and Co., who gave B. credit for the money, part of which they paid over to him, and part to his assignees after he had become bankrupt. R. and Co. paid part of the bills drawn upon them, and rejected others. In an action brought against them by A. for money had and received

to his use: Held, that they were not bound to apply the money paid on the policy to the discharge of the bills drawn by B. for the goods. The defendants, in answer to an application by plaintiff, stated that they could say nothing about some of the bills in question not then accepted, and that their fate must depend upon the state of *Williams'* account when they become due: Held, that this was not a conditional acceptance, and did not bind R. and Co. to apply to the payment of the bills any money that they might receive on account of *Williams*. *Neale v. Reid*, E. 4 G. 4. Page 657

JUDGMENT.

See INDICTMENT, 3.

JURISDICTION.

See CONVICTION, 1. JUSTICES, 3.

By sect. 33. of the 43 G. 3. c. 99. it is enacted, that "if any question or difference shall arise upon taking any distress, the same shall be determined by the commissioners of taxes:" Held, that, as the jurisdiction of the superior courts was not thereby expressly taken away, an action at common law is maintainable for a wrongful distress. *Earl of Shaftesbury v. Russell*, E. 4 G. 4. 666

JUSTICES.

See HIGHWAY, 1.

1. Where a magistrate acts upon a subject matter of complaint, over which he has authority, but which arises out of his jurisdiction, he is entitled to notice of action under 24 G. 2. c. 44. s. 1. *Prestidge v. Woodman, Esq.*, M. 3 G. 4. 12
2. A prisoner, when examined before magistrates under a charge of felony,

felony, is not entitled as of right, to have a person skilled in the law present as an advocate on his behalf, it being a preliminary investigation only, and not conclusive upon him. *Cox, Gent., one, &c. v. Coleridge, Esq., M. 3 G. 4.*

Page 37

3. A. and B., found and arrested on board a boat laden with smuggled goods within the harbour of F., which was within a local exclusive jurisdiction, were afterwards taken, with the boat, &c. to the port of D., and convicted before two justices of the town and port of D., pursuant to 46 G. 3. c. 121. s. 7., 57 G. 3. c. 87. s. 5., and 3 G. 4. c. 110.: Held, that the conviction, which only stated that they had been found and taken on board a boat in the harbour of F., was bad, for not shewing that the justices of D. had jurisdiction over the offence.

Semble, that in this case only the justices of the local jurisdiction of F. had authority to convict; and that the 45 G. 3. c. 121. s. 7. gives jurisdiction to those justices only who reside near to the first port or place into which any ship, &c. shall be carried, or where any person shall be arrested by virtue of that clause. *Kite and Lane's Case, M. 3 G. 4.*

101

4. The Court of K. B. will not grant a mandamus commanding justices of the peace to do that which may render them liable to an action. *The King v. The Justices of Buckinghamshire, E. 4 G. 4.*

485

5. Where a person who had been summoned by two justices under the 7 & 8 W. 3. c. 6. s. 1. appeared before them, and was ordered to pay the tithes demanded, and did not raise any question of modus, but afterwards appealed to the sessions, and there, for the first time, set up a modus, and tendered

evidence to prove it: Held, that the justices at sessions might, in the exercise of their discretion, reject the evidence.

Semble, that the power of justices to try questions of tithes under 7 & 8 W. 3. c. 6. is taken away by the eighth section of that act, where a question of modus is raised. *The King v. Jeffreys, E. 4 G. 4.*

Page 604

6. By the 55 G. 3. c. 68. s. 2., when a footway, &c. is diverted by an order of justices, three descriptions of notice are to be given, and the order is to be confirmed and enrolled at the quarter sessions, held next after the expiration of four weeks from the first day of giving such notice: Held, that the computation must be made from the first day of giving that description of notice which is last published: Held, also, that an assent to the turning of the road, given under the hand and seal of an agent of the party through whose ground the new road is to pass, is insufficient. *Rex v. The Justices of Kent, E. 4 G. 4.*

622

LACHES.

See PROMISSORY NOTE, 3.

LANDLORD AND TENANT.

See PRACTICE, 20.

1. A plea of a right of way stated a surrender to defendant of a copyhold, with all ways then used by the tenants and occupiers thereof; that defendant was admitted and continued seised, and being so seised, and having occasion to use the way, committed the trespass. New assignment, that defendant used the way for other purposes, &c.: Held, that the defendant being landlord had a right, while the copyhold was in the occupation of the tenant, to use the way to remove

remove an obstruction; and that the words of the plea were sufficiently large to comprehend all the purposes for which a person seised might lawfully use the way. *Proud v. Hollis*, M. 3 G. 4. Page 8

2. A. being seised in fee of a mill, and of certain lands, granted a lease of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing certain suits and services; and also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill, and the reversion of the demised premises to the same person: Held, that the reservation of the suit to the mill was in the nature of a rent, and that the implied covenant to render it resulting from the *reddendum*, was a covenant that run with the land as long as the ownership of the mill and demised premises belonged to the same person; and, consequently, that the assignee of the lessor might take advantage of it. *Vyvyan v. Arthur*. H. 3 & 4 G. 4. 410

3. An inclosure act directed, that, in lieu of tithes, a corn rent should be payable to the impropiator and vicar by the person having the possession and occupation of the lands. Part of the inclosed lands were uncultivated and untenanted for some years, during which time the owner lived on another estate; Having afterwards demised them to a tenant: Held, first, that the corn rents were due for the time during which the land was unproductive; and, secondly, that during that time the landlord was legally in the possession of the lands so as to be liable to the burdens imposed by the statute, and that the tenant coming in under him was liable to be distrained upon for the arrears of

rent. *Newling v. Pearse*, H. 3 & 4 G. 4. Page 437

LEASE.

See COVENANT, 2, 3. 5. EVIDENCE, 2. FORFEITURE.

1. Declaration, in consideration that plaintiff would procure A. B. to grant a lease to defendant; the latter promised to pay the plaintiff 170*l*. The proof was that A. B. having agreed to grant a lease to the plaintiff, the latter undertook, originally, to assign it to defendant, for the consideration mentioned; but that afterwards a lease to which plaintiff was a party, and assented, was granted immediately by A. B. to the defendant. The consideration to be paid by the defendant to the plaintiff was not mentioned in that lease: Held, first, that the lease was not void on account of this omission, the *ad valorem* duty imposed by the 50 G. 3. c. 184., applying only to considerations passing between lessor and lessee; and, secondly, that the evidence proved the substitution of a new contract to procure a lease from A. B. to the defendant, in lieu of the original contract, and that there was not any variance. *Boone v. Mitchell*, M. 3 G. 4. 18

2. By marriage settlement, certain premises were conveyed to trustees and their heirs and assigns, to the use of the father and mother of the intended husband, for their lives and the life of the survivor; remainder to the use of the intended husband and wife and their assigns for their joint lives, and the life of the survivor; remainder to the use of the trustees, to preserve contingent remainders during the life of the intended husband and wife, and the survivor; remainder to the use of the heirs of the husband by his intended wife: Held, that, under

After this deed, the husband took an estate for life and an estate tail in remainder, and, consequently, that he could not, when in possession of his life estate, discontinue the estate tail, by granting a lease for lives with livery of seisin; for that discontinuance can be made only by tenant in tail. *See dem. Jones and Others, v. Jones, H. 3 & 4 G. 4.*

Page 238

3. A, being seised, in fee of a mill, and of certain lands, granted a lease of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing certain suits and services; and also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill and the reversion of the demised premises to the same person: Held, that the reservation of the suit to the mill was in the nature of a rent, and that the implied covenant to render it resulting from the redendum, was a covenant that run with the land, as long as the ownership of the mill and the demised premises belonged to the same person; and, consequently, that the assignee of the lessor might take advantage of it. *Vynnyas v. Arthur, H. 3 & 4 G. 4.*

410

4. By act of parliament tenant for life was empowered to grant leases for any term not exceeding ninety-nine years, so as every such lease or leases be made to take effect either in possession, or immediately after the determination of the leases then subsisting thereof respectively, and so as in every such lease there be reserved, payable during the continuance of the term and estate thereby to be granted, the best and most beneficial yearly rent or rents. Part of the estate being let upon

leases which, in due course, would expire on the 10th October, 1791, the tenant for life, in consequence of one bargain, executed at the same time two leases of that part of the estate, one bearing date the 4th May, 1787, for the term of thirty years, to commence on the 10th October, 1791, and the other bearing date 4th June, 1787, for the term of sixty-three years, to commence 10th October, 1821: Held, that this latter lease was void, inasmuch as it was not to take effect immediately after the determination of the subsisting lease.

The first of these two leases reserved a rent of 270*l.*, the second reserved only 120*l.* By a clause in the second lease, the tenant was bound to rebuild, either before the expiration of the term granted by the first lease, or within the first year of the term granted by the second.

Seemle, that although the rents reserved by the two leases might be the most beneficial, as between the lessor and lessee, yet they were not so between the tenant for life and the reversioner, and that, upon that account also, the second lease was void. *See dem. Station, Baronet, v. Hervey, H. 3 and 4 G. 4.*

Page 426

5. Covenant by the lessor that the lessee should hold the premises without any lawful let, suit, interruption, eviction by the lessor, or by or through the lessor's acts, means, right, &c. The lessor held, under a lease, for a longer term, which contained a clause of re-entry by the original lessor, in case the premises should be used for a shop. The under-lessee was not informed of this clause, and undertook to a tenant, who incurred a forfeiture by using the premises for a shop, and the original lessor evicted

MANDAMUS.

NOTICE OF DISHONOUR. 307

evicted him. Held, that this was not an eviction by means of the lease within the meaning of the covenant in the underlease. *Spencer and Another v. Marriott*, H. 3 & 4 G. 4. Page 457

LIBEL.

A publication stating *Jesus Christ* to be an impostor and a murderer in principle, is a libel at common law. *Semble*, that the 53 G. 3. c. 160., does not alter the common law, but only removes the penalties imposed upon persons denying the *Trinity*, by 9 & 10 W. 3. c. 52., and extends to such persons the benefits conferred upon all other Protestant dissenters, by 1 W. & M. s. 1. c. 18. *The King v. Waddington*, M. 3 G. 4. 26

LIBERUM TENEMENTUM.

See PLEADING, 24.

LICENCE.

See SETTLEMENT BY ESTATE, 2.

LIMITATIONS, STATUTE OF.

See EVIDENCE, 10.

LONDON COURT OF REQUESTS ACT.

See COSTS, 9.

MANDAMUS.

See COPYHOLD, 3. SEWERS, 1.

1. The Court of K. B. will not grant a mandamus commanding justices of the peace to do that which may render them liable to an action. *The King v. The Justices of Buckinghamshire*, E. 4 G. 4. 485

2. Mandamus commanding defendant to take upon himself the office of common-councilman in the borough of *Lancaster*. Return—That by a bye-law, persons refusing to fill

that office are subject to a certain fine, and that defendant has paid the fine; Held, that the return was insufficient, as it did not state that the fine was to be in lieu of service. *Rex v. S. Bower the younger*, E. 4 G. 4. Page 585

MANOR.

See COPYHOLD, 1, 2, 3.

MANUFACTORY, PROFITS OF.

See POOR-RATE, 3.

MAYOR.

See CORPORATION, 3.

MODUS.

See APPEAL, 4. JUSTICES, 5.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 3. COSTS, 9. PLEADING, 18.

NEW ASSIGNMENT.

See COSTS, 8. PLEADING, 24.

NONSUIT.

See PRACTICE, 7.

NOTICE OF ACTION.

Where a magistrate acts upon a subject matter of complaint over which he has authority, but which arises out of his jurisdiction, he is entitled to notice of action, under 24 G. 2. c. 44. s. 1. *Prestidge v. Woodman, Esquire*, M. 3 G. 4. 12

NOTICE OF APPEAL.

See APPEAL, 2.

NOTICE OF DISHONOUR.

See BILL OF EXCHANGE, 5.

NOTICE

NOTICE OF DIVERTING A HIGHWAY.

See HIGHWAY, 3.

NOTICE TO QUIT.

See EJECTMENT, 5.

NUDUM PACTUM.

See ADMINISTRATOR, 2.

OFFICE.

See COSTS, 4.

OFFICER.

See CONSTABLE.

OVERSEER.

See HOUSEHOLDER, 2.

OWNERSHIP, ACTS OF.

See EVIDENCE, 9.

OWNERSHIP, APPARENT.

See BANKRUPT, 7, 10.

OYER.

See VARIANCE, 6.

PARSON.

See HIGHWAY, 2.

PARTNERS.

See HOUSEHOLDER, 1, 2.

PARTNERSHIP.

See EVIDENCE, 5. PROCURATION.

1. A number of persons associating together, and subscribing sums of money for the purpose of obtaining a bill in parliament to make a railway, are partners in the undertaking; and therefore a subscriber, who acted as their surveyor, cannot maintain an action for work done by him in that character on account of the partnership, against all

or any one of the other subscribers.

Holmes v. Higgins, M. & G. 4.

Page 74

2. Where a promissory note, beginning "I promise to pay," was signed by one member of a firm for himself and his partners: Held, that the party signing was severally liable to be sued upon the note.

Hall v. Smith, H. 3 & 4 G. 4.

407

PAYMENT.

See BILL OF EXCHANGE, 3.

PAYMENT OF MONEY INTO COURT.

See PLEADING, 1.

PLEADING.

1. Where two breaches were assigned in one count of a declaration upon a contract, and the defendant paid money into court upon one of them: Held, that he thereby admitted the whole contract as set out in that count. *Dyer v. Ashton, M. 3 G. 4.*

2. A plea of a right of way, stated a surrender to defendant of a copyhold with all ways, then used by the tenants and occupiers thereof; that defendant was admitted and continued seised, and being so seised and having occasion to use the way, committed the trespass. New assignment, that the defendant used the way for other purposes, &c.: Held, that the defendant, being landlord, had a right while the copyhold was in the occupation of the tenant, to use the way as remove an obstruction; and that the words of the plea were sufficiently large to comprehend all the purposes for which a person might lawfully use the way. *Proud v. Hollis, M. 3 G. 4.*

3. Declaration stated that the defendant at Dublin made a promissory

missory note, and thereby promised to pay the same at *Dublin*, without alleging it to be at *Dublin* in *Ireland*. Held, that upon this declaration the promissory note must be taken to have been drawn in *England* for *English* money, and therefore, that proof of a note made and payable at *Dublin* in *Ireland*, for the same sum in *Irish* money, did not support the declaration.

10+ *Sproule v. Legge*, *M. 3 G. 4.*

Page 16

4. Declaration in consideration, that plaintiff would procure *A. B.* to grant a lease to defendant, the latter promised to pay the plaintiff 170*l.* The proof was, that *A. B.* having agreed to grant a lease to the plaintiff, the latter undertook originally, to assign it to defendant for the consideration mentioned; but, that afterwards a lease was granted to which plaintiff was a party and defendant, was granted immediately to *A. B.* to the defendant. The consideration to be paid by the defendant to the plaintiff was not mentioned in that lease: Held, first, that the lease was not void on account of this omission, the ad valorem duty imposed by the 50 *G. 3. c. 104.*, applying only to considerations passing between lessor and lessee; and, secondly, that the evidence proved the substitution of a new contract, to procure a lease from *A. B.* to the defendant in lieu of the original contract, and that there was not any variance. *Boone v. Mitchell*, *M. 3 G. 4.*

18

16. Covenant to save harmless certain premises against all actions, suits, claims, and demands whatsoever, in law and equity, which might be made, commenced, or prosecuted by *H. W. P.* or *T. B. W. P.* Breaches, first, that *H. W. P.*, on &c. at &c. who then and there made a claim and demand.

1019

mand, and claimed to have a right and title to the premises, entered and cut trees, &c. and procured the occupier to attorn to him; secondly, that certain title deeds relating to the premises were withheld, by one *A. W.*, at the instance, and through the claim and demand of *T. B. W. P.* Plea to first breach, that *H. W. B.* had no lawful claim or title to the premises; to second breach, similar plea as to *T. B. W. P.* Demurrer and joinder: Held, first, that *H. W. P.* and *T. B. W. P.* being named in the covenant, the indemnity extended to all claims made by them, whether upon lawful title or otherwise; and, secondly, that the acts upon which the breaches were assigned were claims in law within the meaning of the covenant. Query, whether the breaches would have been good in form, if specially demurred to?

Fowle, Executor, v. Welsh, *M. 3 G. 4.*

Page 29

6. Where a count stated that *A. B.* supplied the poor of the parish of *W.* with provisions, and the evidence was, that he supplied the poor of the parish of *W.*, and other parishes in a workhouse: Held, first, that it was no variance, the proof being larger than the allegation. Secondly, that the objection as to a variance between the allegation of a supply of the poor, and the proof of a supply of the poor in the workhouse, not being taken at nisi prius, could not be afterwards available. *West v. Andrews*, *M. 3 G. 4.*

77

7. Where the goods of *A.* were distrained for rent arrears after the amount had been tendered: Held, that *A.* might bring an action on the case for an excessive distress. *Branscomb v. Bridges and another*, *H. 3 & 4 G. 4.*

145

8. Where the declaration stated that

3 G. 4. a bill

a bill of exchange was indorsed by certain persons trading under the firm of *H. and F.*, by procurement of *J. D.*: Held, that this allegation was supported by evidence of *J. D.*'s hand-writing, and that he, being the managing partner in a firm which carried on all business of buying and selling under the designation of *H. and Co.*, was in the habit of indorsing bills in the manner above stated; although there was no such person as *F.* in the firm of *H. and Co.*, and no direct proof that *J. D.*'s partners were privy to those transactions. One partner may act for the whole firm by procurement. *Williamson v. Johnson*, *H. 3 & 4 G. 4.*

Page 146

9. Where a bill of exchange was indorsed generally, but delivered to *S. C.* as administratrix of *J. C.* for a debt due to the intestate, and *S. C.* died intestate after the bill became due, and before it was paid: Held, that the administrators de bonis non of *J. C.* might sue upon the bill; and that their title was sufficiently proved by the letters of administration de bonis non, without producing those granted to *S. C.* the administratrix.

Defendant having pleaded an agreement made between the plaintiffs and other creditors of the defendant of the one part, and defendants of the other part; that the defendant should assign certain credits and effects to two persons upon certain trusts, and that plaintiffs agreed to accept those conditions in discharge of their demand, provided all the creditors assented; that defendant did assign, and that all the creditors assented: Held, that the affirmative of the issue being on the defendant, he was bound to prove the assent of all his creditors.

Semble, that he was bound to

prove the assent of the plaintiffs, as well as that of his other creditors. *Cathwood and another Administrator v. Chabaud*, *H. 3 & 4 G. 4.* Page 150

10. Commissioners of bankrupts are not liable to an action of trespass for committing a person who does not answer to their satisfaction when examined before them, touching the estate and effects of a bankrupt. *Doswell v. Impey and two Others*, *H. 3 & 4 G. 4.* 163

11. Where in an action of trespass the lord of a manor set out various burthens borne by him, and then prescribed, not by reason of those burthens, but generally as lord of the manor, for a toll upon all goods bought and delivered, or bought elsewhere and brought into and delivered in a town within the manor, which from time immemorial had been parcel of the manor: Held, after verdict, that this was good as a claim of toll traverse, although the burthens set out did not constitute a sufficient consideration for a toll thorough.

Where a legal commencement of a prescription can be presumed, that, after verdict, is sufficient to support the claim. *Richards v. Bennett and Another*, *H. 3 & 4 G. 4.* 223

12. Where an action was brought against *A.* and *B.*, and *C.* his wife, upon a joint promissory note made by *A.* and *C.* before her marriage, and the promise was laid by *A.* and *C.* before her marriage, and defendants pleaded the statute of limitations, whereupon issue was joined: Held, that an acknowledgment of the note by *A.* within six years, but after the intermarriage of *B.* and *C.* was not evidence to support the issue. *Pitnam v. Foster*, *H. 3 & 4 G. 4.* 248

13. The keeping of a common gaming house, and for lucre and gain, unlawfully

unlawfully causing and procuring divers idle and evil disposed persons to frequent, and to come to play together at a game called "Rouge et Noir," and permitting the said idle and evil disposed persons to remain playing at the said game for divers large and excessive sums of money, is an indictable offence at common law. *Semble*, that an indictment would be good, merely charging the defendant with keeping a common gaming-house. Per *Holroyd J. The King v. Rogier and Humphrey*, H. 3 & 4 G. 4. Page 272

14. Declaration in assumpsit for use and occupation. Plea, that after the cause of action accrued, and before the exhibiting of the plaintiff's bill, the defendant delivered to the plaintiff certain goods in satisfaction of the promises in the declaration, which the latter accepted in satisfaction. This plea being in every respect false, the Court permitted the plaintiff to sign judgment as for want of a plea. *Richley v. Proone*, H. 3 & 4 G. 4. 286

15. An ambiguous expression in a declaration is cured by verdict, and must afterwards be taken to have been used in that sense, which would sustain the verdict. *Lord Huntingtower v. Gardiner*, H. 3 & 4 G. 4. 297

16. By 9 G. 1. c. 22. s. 7., the inhabitants of the hundred are to make satisfaction for damages occasioned by the acts therein mentioned: Held, that under this statute, the action must be against all the inhabitants of the hundred; and the declaration being against two only, it was held bad in arrest of judgment. *Jackson v. Pearson and Squirrel*, H. 3 & 4 G. 4. 304

17. Where a declaration states, that by a certain indenture, "It is witnessed, &c.," and sets out the

very words of the deed, there is no variance, although the legal effect of the whole deed may be different from that which the part set out imports. Where the defendant sets out on oyer, a deed upon which the declaration is framed, he cannot on demurrer take advantage of a variance in an immaterial part between the deed as stated in the declaration, and as set out on oyer. *Ross Administrator de bonis non*, H. 3 & 4 G. 4. Page 358

18. A mortgaged lands in fee to B. and Co., with a power of sale upon trust to repay themselves the monies advanced, &c. and to pay over the surplus to A., his executors or administrators. Before any sale was made A. died, having devised all his real and personal property to C. and D. (whom he also made executors) upon trust, to sell and pay debts, &c. During the lifetime of C. and D., B. and Co. sold the estate, and paid the surplus into the hands of E. who was agent for C. and D. Whilst the money remained in E.'s hands, C. and D. died. E. also died soon after, leaving the defendant his executor. The plaintiffs having taken out administration de bonis non, with the will of A. annexed, brought an action for money had and received against the defendant: Held, that it could not be maintained, for that the money in the defendant's hands was equitable and not legal assets, and therefore would not have been recoverable by C. and D. in their representative character: Held, also, that a promise, made by the defendant to pay the money to the plaintiffs, was merely nudum pactum, they not being entitled to receive it. *Clay v. Willis*, H. 3 & 4 G. 4. 364

19. Where a promissory note, beginning "I promise to pay," was signed

3 G 2

signed

signed by one member of a firm for himself and his partners: Held, that the party signing was severally liable to be sued upon the note. *Hall v. Smith, H. 3 & 4 G. 4.* Page 406

28. A. being seised in fee of a mill and of certain lands, granted a lease of the latter for years; the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing certain suits and services; and also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill, and the reversion of the demised premises to the same person: Held, that the reservation of the suit to the mill was in the nature of a rent, and that the implied covenant to render it, resulting from the reddendum, was a covenant that run with the land as long as the ownership of the mill and the demised premises belonged to the same person, and, consequently, that the assignee of the lessor might take advantage of it. *Vyoyan v. Arthur, H. 3 & 4 G. 4.* 410

29. A. and Co. and B. and Co. respectively carried on the business of bankers at Maidstone. B. and Co. became bankrupts; and at the time of their act of bankruptcy the two banks held notes and other securities of each other to nearly the same amount. The provisional assignee of B. and Co., knowing that fact, presented and obtained payment of the notes of A. and Co., partly at their bank, and partly at the house of their agents in London, who were ignorant of the situation in which the parties stood: Held, that A. and Co. might recover the amount so received, in an action for money had and received against the provisional as-

signed. *Newman v. Newman, H. 3 & 4 G. 4.* Page 418

30. An action on the 9th Anne, c. 14. brought by the assignee of a bankrupt to recover money lost by the bankrupt at play, the bankrupt who had obtained his certificate, was called as a witness to prove the loss: Held, that he was incompetent, but that his competency was restored by three releases; first, by the bankrupt to the assignee; secondly, by all the creditors to the bankrupt; thirdly, by the assignee (who was not a creditor) to the bankrupt: Held, secondly, that a year after the commission issued, it might be presumed that all the creditors had proved, and that a release signed by all those who had proved, might therefore be considered as a release by all the creditors; thirdly, that such a release did not destroy the assignee's right of action. *Carter, Assignee, v. Abbott, H. 3 & 4 G. 4.* 444

23. Declaration upon an indenture of apprenticeship for breach of a covenant, whereby the defendant, in consideration of a premium of 90*l.*, covenanted to instruct the apprentice in his trade, and provide him with diet, &c. Breach, that the defendant did not, after making the indenture, instruct the apprentice, but, on the contrary, refused so to do; and after the making of the indenture, to wit, on the 19th July, refused then or at any other time to instruct him, and that the defendant did not after making the indenture, provide the apprentice with diet, &c.; but, on the contrary thereof, on the 19th July, compelled him to quit his service before the expiration of the term: Plea, as to the not instructing and not providing with diet and lodging before the 10th of July; that he did instruct and provide him

him with diet and lodging till that time. Upon this plea issue was taken and joined. And as to the not instructing, and not providing with diet and lodging, upon and after the 10th of July, that the defendant was ready and willing to instruct, and provide the apprentice with diet and lodging during the whole term; but that the apprentice would not, after making the indenture, serve the defendant, but frequently, and particularly on the 10th July, refused so to do; and that, on the 10th day of July, the apprentice refused to do particular acts therein mentioned, which he was bound to do as such apprentice; and on the contrary thereof, against the positive orders of the defendant, absented and wholly withdrew himself from his service, declaring that he never intended to return again to his service, whereby defendant was prevented from instructing, and providing him with diet and lodging according to the indenture. Replication, that after the apprentice had been guilty of the supposed breaches of duty as mentioned in the plea, to wit, on the 13th July, he, the apprentice, returned to the defendant and offered to serve him as such apprentice during the residue of the term, and requested him to receive him and provide him with diet and lodging, but that defendant refused so to do; demurrer assigning for cause, that plaintiff had by his declaration complained of a continued breach of covenant in not instructing, &c. the apprentice, from the time of making the indenture till the commencement of the suit; and, although the second plea answered to the whole time in the declaration after the 10th July, yet, that the plaintiff had omitted to reply

to such parts of defendant's second plea as related to not instructing, &c. the apprentice on the 10th of July, and between that time and the 13th of July: Held, that the plaintiff's claim was not entire, but divisible, and covered every part of the time during which the master refused to instruct the apprentice, and consequently, that there was no discontinuance: Held, also, that the replication was not a departure from the declaration, the gravamen of the complaint being, that the defendant had compelled the apprentice to quit his service, and the replication shewing the manner in which he had so done it: Held, also, that the covenants in an indenture of apprenticeship are independent covenants; and, consequently, that acts of misconduct on the part of the apprentice stated in the plea, were not an answer to an action brought for breach of the covenant by the master, to instruct and maintain the apprentice during the term agreed upon by the indenture. *Winstane the Elder, and Winstone the Younger, v. Linn*, H. 3 & 4 G. 4. Page 460

24. In trespass *quare clausum fragit*, where the plaintiff names the close in his declaration, and the defendant pleads *liberam tenementum* generally, without giving any further description of the close, the plaintiff is not driven to a new assignment, but is entitled to recover upon proving a trespass done in a close in his possession bearing the name given in the declaration, although the defendant may have a close in the same parish known by the same name. *Cocker v. Crompton and Others*, 3 A. G. 4. 189

25. Debt by the drawer against the acceptor of a bill of exchange, payable to the drawer or his order, for value received in goods: Held, 3 G. 3. that

that the action would lie. *Priddy and Another v. Henry*, E. 4 G. 4.

Page 674

26. Declaration, that defendant was indebted to plaintiff in account, and thereupon, in consideration of the premises, and that plaintiff would take and accept the work and labour of the defendant as a plumber and glazier, at reasonable prices, to the extent of that debt, defendant promised to do the work. Counts for money had and received, &c. It was proved that the plaintiff by deed, had assigned certain premises to the defendant for a sum of money therein mentioned. The deed stated that sum to have been well and truly paid, and released the defendant therefrom. Parol evidence was given to shew that, in fact, part of the purchase-money had not been paid, but that it was agreed by parol between the parties at the time of the execution of the deed, that that part of the purchase-money should be retained by the defendant, and that he should do work for the plaintiff to that amount: Held, that if this evidence was admissible, still it did not support the declaration: Held, secondly, that assuming the legal effect of the agreement to be, that the entire consideration-money had been paid, and that part was returned in consideration of the defendant's promising to do work, the parol evidence would not contradict the deed and would be admissible; but that inasmuch as the original debt was extinguished by the release in the deed, and no new debt was created, but merely an obligation to do work arising out of a new special contract, ought to have been declared upon. *Baker v. Dewey*, E. 4 G. 4.

704

POOR-RATE.
A guardian of the poor, appointed under 22 G. 3. c. 38, is within the 55 G. 3. c. 137, s. 6, notwithstanding the former act, 4. 42, imposes a penalty for the supply of the provisions for the poor by such guardians. Where a count stated that A. B. supplied the poor of the parish of W. with provisions, and the evidence was, that he supplied the poor of the parish of W. and other parishes in a workhouse: Held, first, that it was no variance, the proof being larger than the allegation. Secondly, that the objection as to a variance between the allegation of a supply of the poor, and the proof of a supply of the poor in the workhouse not being taken at Nisi Prius, could not be afterwards available. *West v. Andrews*, M. 3 G. 4. Page 77

POOR-RATE.

1. Firs and larches planted with oaks for the purpose of sheltering the latter, and cut from time to time, as the oaks grew larger and required more space, but when once cut, not growing again, and some of them yielding a profit by sale, are not saleable underwoods within the 43 Eliz., the primary object of planting them being to protect the oaks, and not to derive a profit from them per se by sale.

Semble, that they are not underwood at all. *The King v. The Inhabitants of Ferrybridge*, H. 3 & 4 G. 4. 375

2. Where a corporation consisting of a mayor, aldermen, and twenty-four capital burgesses, was seized in fee of certain pasture lands, and appointed a ranger to keep the keys of the gates, clear the ditches, preserve the fences, and impound cattle trespassing thereon, and at

a court held ~~locally~~, made such regulations concerning their pastures, and the number of cattle each burgess was to turn on, and the sum to be paid in respect thereof, which money, after deducting the expenses of management of the land, was distributed among the burgesses who did not turn on: Held, that the corporation were liable to be rated to the poor, as the beneficial occupiers of these pastures. *Rex v. The Mayor, Aldermen, and Burgesses of Sudbury*, H. 3 & 4 G. 4.

Page 589

8. By an act of parliament the Birmingham Gas-light and Coke Company had power given them to supply the town of B. with gas, and to lay down pipes for the conveyance of gas from the manufacturer to the houses of the consumers. Under this act the company purchased lands and buildings, and there placed retorts necessary for the manufacture of gas and coke, and fixed in the streets, trunks, pipes, &c. for the conveyance of gas. The company derived a considerable profit from the manufacture of, and sale of coke and gas. The stock in trade, and the profits of other manufactories in the parish of B. were not rated to the poor: Held, that the company were not rateable to the amount of the profits of their trade, but for a sum equal in amount to that for which the premises would let to other persons willing to carry on the same business. *Rex v. The Birmingham Gas-light and Coke Company*, E. 4 G. 4.

506

9. The proprietors of an inland navigation were rated to the relief of the poor for a certain number of acres of land within the township occupied by their canal, and were assessed in respect of that land at a sum not exceeding that which

they actually received for the passage of goods over that part of the canal situate within the township: Held, that this rate was good. *The King v. The Proprietors of the Trent and Mersey Navigation*, E. 4 G. 4.

Page 545

5. The proprietors of an inland navigation are rateable to the relief of the poor in every parish through which the navigation passes, as occupiers of the land situate in each parish, used for the purpose of the navigation; and therefore, where the proprietors of such a navigation, which extended through different parishes, were rated in one for the entire amount of their tolls, this Court held that the rate could not be supported. *Rex v. Palmer*, E. 4 G. 4.

546

6. The proprietors of a navigation extending through several parishes, are to be rated in an intermediate parish, not in respect of the riverage becoming due in that parish for goods landed there, but in respect of the profits of the land, used for the navigation, situate within the parish. *Rex v. The Earl of Portmore and Another*, E. 4 G. 4.

551

7. Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings: Held, that his goods in that house not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates. *Novello v. Toogood*, E. 4 G. 4.

554

POSTEA.

See PRACTICE, 10.

POST-HORSE DUTY.

In order to make horses let to hire liable to the post-horse duty, they must be let to be used in travelling: Held,

3 G 4

Held,

1. Held, that it was a letting, to hire
to be used in travelling, where a
horse was hired in London to go
to Richmond and back, to return
on the same day, that being an as-
certained distance of twenty miles.
2. So, where a horse was hired for
fourteen days to go a journey.
3. But not where it was to be used
to go ten or twelve miles into the
country and back the same even-
ing; or where it was to be used
for an hour or two for an airing;
or where it was to be used in rid-
ing twenty miles into the country
and back the same day. *Ramsden*
v. Gill, *H. 8 & A. G. 4*, Page 819

POWER OF LEASING.

See LEASE, 4.

PRACTICE.

1. Where two breaches were assigned in one count of a declaration upon a contract, and the defendant paid money into court upon one of them: Held, that he thereby admitted the whole contract as set out in that count. *Dyer v. Ashton*, *M. 3 G. 4*. 3
2. The 17 G. 3. c. 26. s. 4. is not imperative on the Court, but it is in their discretion either to vacate the securities given for an annuity in case of a violation of that clause of the act, or to do so on certain terms, or to refuse to do so, according to the circumstances of each particular case. *Girdlestone v. Allan*, *M. 8 G. 4*. 61
3. In an action against several defendants a verdict was taken for the plaintiff for 400*l.* damages, subject to a point of law, reserved for the opinion of the Court; and in case that point should be determined in favour of the plaintiff, then subject to the award of a barrister as to the damages. The point of law having been decided

in favour of the plaintiff, the arbitrator having been consulted by both of the parties in the case, declined proceeding in the reference. One of the defendants refused to name any other arbitrator. Under these circumstances the Court ordered judgment and execution to issue against that defendant for the damages found by the jury, unless he would consent to refer the damages to some other arbitrator. *Woolley, Escautrie, v. Kelly*, *M. 3 G. 4*. Page 68

4. A defendant was held to bail for a sum of money claimed to be due to the plaintiff for board and lodging, charged at the rate of 2*l.* 2*s.* per week. At the trial, it was proved that the plaintiff had expressly agreed to charge at the rate of 1*l.* 1*s.* per week only, and a verdict was found for a sum less than that for which the defendant was held to bail. A rule nisi having been obtained for allowing the defendant his costs under the 43 G. 3. c. 46. s. 3., the plaintiff, in answer thereto by his affidavit, denied that there was any such agreement, and swore that the whole sum claimed was justly due to him; under these circumstances, the Court acted upon the testimony given at the trial, and made the rule absolute. *Gleaville v. Hutchins*, *M. 3 G. 4*. 91

5. Where a rule for a new trial is silent as to the costs of the first trial, and the cause is afterwards referred at Nisi Prius, and determined in favour of plaintiff, he is not entitled to the costs of the first trial. *Summers v. Formby*, *M. 3 G. 4*. 100

6. An affidavit of debt stated that defendant was indebted to plaintiff, upon a written agreement to marry plaintiff at a time specified, or pay her 1000*l.*, and that he had not done either, although the time had elapsed

elapsed, and plaintiff was ready and willing to marry defendant, and requested him to marry her: Held, that this was insufficient, as the Court can take nothing by interment in an affidavit of debt; and here no consideration for the defendant's promise was shown. *Macpherson v. Loeis*, M. 3 G. 4. Page 108

7. Where a plaintiff did not appear at the trial, the record having been taken down by proviso, and a verdict for the defendants was taken by mistake at Nisi Prius, instead of a nonsuit; the Court, though this was irregular, would not permit the plaintiff to set it aside, unless on the terms of consenting to a nonsuit being entered. *Hodgson, Gent. v. Forster and Others*, M. 3 G. 4. 110

8. Before a writ is returnable, it may be altered as to the return-day without being re-stamped, provided the last-appointed return-day be not beyond the time at which the writ might at first have been made returnable. *Durden v. Hammond*, M. 3 G. 4. 111

9. A bankrupt who has obtained his certificate cannot be arrested upon a subsequent promise to pay a debt due before his bankruptcy. *Peers v. Gadderer*, M. 3 G. 4. 116

10. Where a plaintiff in ejectment has been nonsuited, the defendant not having appeared to confess lease, entry, and ouster, judgment may be regularly signed on the first day of the ensuing term, and a writ of possession issued on the same day, although the *postea* be not delivered over at the time by the associate to the attorney for the plaintiff. *Doe dem. Davies and Wife v. Roe*, M. 3 G. 4. 118

11. A party having been prevented from suing out execution in an ejectment by an injunction in Chancery, which continued in force for many years, during which

the term in the declaration in ejectment expired, the Court would not permit it to be enlarged, unless it were quite clear that the amendment would work no injustice to the opposite party. *Bradney and Another v. Hasselden*, M. 3 G. 4. Page 121

12. One of the king's yeomen of the guard had been arrested without leave from the Lord Chamberlain by process issuing out of the Palace Court; and that court had refused to discharge him out of custody on filing common bail. Bail above was put in, and perfected in that court; and after interlocutory judgment signed, the defendant removed the cause into K. B. by habeas corpus, and put in and perfected bail. Under these circumstances the Court refused to order an exoneretur to be entered on the bail-piece. *Sard v. Forrest*, M. 3 G. 4. 139

13. The Court will not grant a certiorari to remove an indictment from the quarter sessions after judgment has been pronounced in that court. *Rex v. Inhabitants of Pennegoes and Mackynlleth*, M. 3 G. 4. 142

14. A certiorari issued to remove a cause from the court of great sessions in Wales without any special ground for so doing, and without any notice having been given to the opposite party, but was not delivered to the Judges of that court till the day before the trial would in course have taken place, and after great expences had been incurred; under these circumstances this Court not only quashed the certiorari, and directed a *procedendo* to issue, but ordered that the party who caused it to issue should pay to the opposite party the costs incurred by the latter in the court below. *Jones v. Davies and Others*, M. 3 G. 4. 143

15. An

15. An attorney of the Court of K. B. may sue out a commission of bankruptcy, and maintain an action for the fees due upon that business, without being admitted a solicitor in Chancery. *Wilkinson, Gent., 1st ed., 8 & 9. Digges, H. 3 & 4 G. 4. Page 158*
16. A bankrupt having obtained his certificate before the rising of the Court, on the day when the second writ of facias against the bail was returned, the Court ordered an excoptatur to be entered on the bail. *Johnson v. Lindsay, H. 3 & 4 G. 4. 247*
17. A certiorari will lie to remove an ejectment from an inferior court. *Ex dem. Sadler v. Dring, H. 3 & 4 G. 4. 253*
18. An attorney entering a plaint, and suing out process in the county court, during the time of his imprisonment, is within the meaning of 12 G. 2. c. 13. s. 9., and liable to be struck off the roll. *In the Matter of Flint, Gent., one, 8 & 9. 254*
19. A separate commission having issued against A., and a joint commission against A. and B., the assignees under the separate commission obtained a verdict against C. The Court ordered the money to be paid into court until a petition pending before the Lord Chancellor to supersede the separate commission was decided. *Hodgkinson and Others, Assignees, v. Travers, H. 3 & 4 G. 4. 257*
20. The Court will not, on the application of a defendant, in an action brought to try the title to land, compel the plaintiff or his landlord to permit the defendant to inspect, or take a copy of one of the landlord's title deeds to the estate. *Pickering v. Noyes, H. 3 & 4 G. 4. 262*
21. Personal knowledge of an award and rule of court, makes the party liable to an attachment for not performing the award, although he has not been personally served. *In the Matter of Bower, H. 3 & 4 G. 4. Page 264*
22. Articles of clerkship were duly stamped and executed, and transmitted to agents in town, for the purpose of being enrolled with the proper officer of the court. It appeared that in the agent's book there was an entry in the handwriting of a clerk, who had left the country, of his having attended the enrollment, and paid a fee on that occasion; but there was no entry of such an enrollment in the book kept at the master's office. The Court refused to order the counterpart of the articles to be registered nunc pro tunc, or to order the party to be admitted an attorney. *Ex parte Pilgrim, H. 3 & 4 G. 4. 264*
23. On moving for a rule nisi for a certiorari, it is irregular to entitle the affidavits in any cause; and if they are entitled, they cannot be read. *Ex parte John Nohro, H. 3 & 4 G. 4. 267*
24. Where there is reasonable ground for supposing that the evidence of a witness will be admissible, the master may allow his expences on taxation of costs against the other party. *Rushworth, Gent. v. Wilson, H. 3 & 4 G. 4. 267*
25. If a defendant brings a writ of error, and puts in sham bail, the plaintiff may treat them as a nullity, and issue execution. *Ward v. Levi, H. 3 & 4 G. 4. 268*
26. An attorney engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profit instead of a salary. The names of both were painted on the office-door, and bills for business were made out and delivered in their joint names: Held, that this was a case within 22 G. 2. c. 46.

c. 46. s. 11., "inasmuch as the attorney had allowed his name to be used for and on account of an unqualified person: and the Court ordered the attorney to be struck off the roll, and the clerk to be committed to prison for a month.

In the Matter of Thomas Jackson and John Wood, H. 3 & 4 G. 4.

Page 270

27. Where a seafaring man remained in this country in order to give evidence in a cause: Held, that on taxation of costs, the master was justified in allowing him a subsistence from the service of the writ until the trial. *Berry v. Pratt, H. 3 & 4 G. 4.* 276

28. In trespass for cutting down trees. Plea, first, not guilty; second, justifying, because the trees obstructed a highway. Replication joined issue on plea of not guilty, and denied the highway; and now assigned cutting down trees extra viam. Defendant joined issue on the special plea, and suffered judgment by default on the new assignment. The jury having found a verdict for the defendant on the issue on the special plea, and assessed damages on the new assignment: it was held that plaintiff was entitled to full costs, except upon the issue on the special plea, and that defendant was not entitled to costs even on that issue. *Longden v. Bourn, H. 3 & 4 G. 4.* 278

29. Where the lessor of the plaintiff having entered into the common rule to pay costs, died between the commission-day and the trial, and the plaintiff was nonsuited on the merits: Held, that the executor of the lessor was not liable to pay the costs. *Doe dem. Pain v. Grundy, H. 3 & 4 G. 4.* 284

30. Where bail justified at Chambers by consent, but the defendant did not serve any rule for the allow-

ance, or give notice that the bail had justified: Held, that the plaintiff might take an assignment of the bail-bond. *Bignold v. Lee, H. 3 & 4 G. 4.* Page 285

31. Declaration in assumpsit for use and occupation. Plea, that after the cause of action accrued and before the exhibiting of the plaintiff's bill, the defendant delivered to the plaintiff certain goods in satisfaction of the premises in the declaration, which the latter accepted in satisfaction. This plea being in every respect false, the Court permitted the plaintiff to sign judgment as for want of a plea. *Richley v. Proome, H. 3 & 4 G. 4.* 286

32. The defendant's attorney, upon the taxation of costs, stated that there was error upon the second, viz. a variance between the affidavit to hold to bail and the declaration. He had previously told the plaintiff that he would never recover the fruits of his judgment, as the defendant was not in a situation to pay, he never having paid him any thing on account of costs: the plaintiff having been served with the allowance of a writ of error, and the defendant having disclosed no other ground of error by his affidavit, the Court refused to set aside an execution issued after the allowance of a writ of error. *Eiske v. Sowerby, H. 3 & 4 G. 4.* 287

33. The Court of K. B. will not grant a mandamus commanding justices of the peace to do that which may render them liable to an action. *The King v. The Justices of Buckinghamshire, E. 4 G. 4.* 465

34. A cause cannot be removed from an inferior court by habeas corpus, unless the defendant is actually or virtually in custody. *Mitchell v. Mitcheson, E. 4 G. 4.* 513

35. On the 6th February a rule to discontinue the action on payment of

of costs was obtained by the plaintiff. The costs were not taxed until the 11th of March. Held, that when the costs were taxed, and the judgment of discontinuance entered up, it related back to the day when the rule for discontinuance was obtained, and that the action was to be considered discontinued from that time. *Bradt v. Peacock*, *Et. 3 G. 4.* Page 649

36. A declaration cannot be delivered de bene esse, on process returnable on the last return of the term. *Key v. Brown*, *Et. 4 G. 4.* 653

37. A defendant having appeared to the action by one attorney, cannot in the same cause make any application to the court by another without having obtained an order for changing his attorney. *Ginders v. Moore*, *Et. 4 G. 4.* 654

38. The Ecclesiastical Court has no jurisdiction over trusts, and therefore, where a party sued as a trustee was arrested on a writ de contumace capiendo, this Court discharged him out of custody. *Ex parte Jenkins*, *Et. 4 G. 4.* 655

PREScription.

See PLEADING, 11. TRESPASS, 3.

PRINCIPAL AND AGENT.

1. Where the attorneys for the plaintiff and defendant, in a cause which was ready for trial, entered into an agreement, whereby they personally undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a certain manner: Held, that the attorneys for the plaintiff were personally bound to pay the costs when taxed in the

mode specified. *Harris, gent. one, &c. v. Conington, gent. one, &c.* *H. 3 & 4 G. 4.* Page 160

2. A. consigned goods to B., the captain of an Indiaman, who was about to sail on a voyage to Calcutta, and directed the latter to invest the proceeds in certain specified articles, or in bills at the exchange of the day. B. sold the goods at Calcutta, and invested the proceeds in sugar, which was not one of the articles specified in his instructions, and informed A. of the purchase by a letter, which the latter received on the 29th May. B. had no commercial establishment in this country, but by a memorandum on a promissory note given by him to A. before he sailed for India, it appeared that one C. had acted as his agent in some insurance transactions. On the 7th August, A. notified to C. that he would not accept the sugars, and advised the latter to insure them. C. declined to interfere, alleging that he had no knowledge of any transactions between A. and B.: Held, upon these facts, in an action brought by A. to recover the proceeds of the goods shipped by him, that the jury were well warranted in finding that A. had assented to the purchase made by B. *Prince v. Clark*, *H. 3 & 4 G. 4.* 186

PRISONER.

See HABEAS CORPUS, 1.

A prisoner when examined before magistrates under a charge of felony, is not entitled, as of right, to have a person skilled in the law present as an advocate on his behalf, it being a preliminary investigation only, and not conclusive upon him. *Cobb, gent. one, &c. v. Coleridge Esquire, and Another.* *H. 3 G. 4.* 37

PRIVILEGE.

PRIVILEGE.

See PRACTICE, 12. AMBASSADOR.

PROCURATION.

One partner may act for the whole by procuration. *Williamson v. Johnson*, H. 3 & 4 G. 4. Page 146

PROMISSORY NOTE.

1. Declaration stated that the defendant, at *Dublin*, made a promissory note, and thereby promised to pay the same at *Dublin*, without alleging it to be at *Dublin* in *Ireland*: Held, that upon this declaration the promissory note must be taken to have been drawn in *England* for *English* money, and therefore that proof of a note made, and payable at *Dublin* in *Ireland*, for the same sum in *Irish* money, did not support the declaration. *Sproule v. Legge*, M. 3 G. 4. 16

2. A promissory note made in *Scotland* is negotiable in *England*, and an action may be maintained upon it by the indorsee against the maker. *Milne v. Graham*, H. 3 & 4 G. 4. 192

3. Where the traveller of *A.*, a tradesman, received in the course of business a promissory note, which he delivered to his master without indorsing it, and the note having been returned to *A.* dishonoured, the latter not knowing the address of the next preceding indorser, wrote to his traveller, who was then absent from home, to enquire respecting it: Held, that *A.* was not guilty of laches, although several days elapsed before he received an answer, and gave notice to the next party, as he had used due diligence in ascertaining his address. *Baldwin and Others v. Richardson and Another*, H. 3 & 4 G. 4. 245

4. Where an action was brought against *A.* and *B.* and *C.* his wife, upon a joint promissory note, made by *A.* and *C.* before her marriage, and the promise was laid by *A.* and *C.* before her marriage, and defendants pleaded the statute of limitations, whereupon issue was joined: Held, that an acknowledgment of the note by *A.* within six years, but after the intermarriage of *B.* and *C.* was not evidence to support the issue. *Pittam v. Foster*, H. 3 & 4 G. 4. Page 248

5. Where a promissory note beginning "I promise to pay," was signed by one member of a firm for himself and his partners: Held, that the party signing was severally liable to be sued upon the note. *Hall v. Smith*, H. 3 & 4 G. 4. 497

PROTECTION.

See BANKRUPT, 11.

QUO WARRANTO.

See COSTS, 4.

RATE.

See HIGHWAY, 2. POOR RATE. UNDERWOOD.

By an act for cleaning, lighting, watching, and regulating the streets of a township, the commissioners were authorised to ascertain the sum to be raised by rates or assessments on the several inhabitants of the township, and to raise such sums from time to time, by rates or assessments upon the tenants and occupiers of all messuages, houses, warehouses, shops, cellars, vaults, stables, coach-houses, brew-houses, and other buildings, gardens, or garden ground, and other tenements in the township. By another clause the occupier of any messuage, dwelling-house, or warehouse,

warehouse, or other building, or of any other tenement, of the yearly value of 80*l.*, within the township, was appointed a commissioner: Held, that under this act the trunks and pipes, works, and other apparatus of a water company for the supply of the town with water, did not constitute a tenement within the meaning of the act; and, therefore, the company were not liable to be rated in respect of such property. *The King v. The Company of Proprietors of the Manchester and Salford Waterworks, &c.* 4 G. 4.

Page 630

RECITAL.

See AGREEMENT, 1. SHIP, 1. VENDOR AND VENDEE, 5.

REGULA GENERALIS.

H. 3 & 4 G. 4.

288

E. 4 G. 4.

656

RELEASE.

See ASSUMPSIT. EVIDENCE, 13.

RENT, ACTION FOR.

See COSTS, 9.

REPUTED OWNERSHIP.

See BANKRUPT, 7-10. EVIDENCE 13.

RESCUE.

See VENDOR AND VENDEE, 6.

RESERVED RENT.

See COVENANT, 2. LEASE, 3, 4. LESSOR AND LESSEE, 1.

RETURN.

See COPYHOLD, 3. MANDAMUS, 7-11 A. 4.

ROAD.

See HIGHWAY, 3. JUSTICES, 1. 6. WAYS, 1, 2.

SALEABLE UNDERWOOD.

See UNDERWOOD. POOR RATE.

SAMPLE.

See VENDOR AND VENDEE, 1.

SEA-WALL.

See SEWERS.

SETTLEMENT.

A minor having enlisted into the marines, was discharged from that service and returned to his father's family before he attained the age of twenty-one years: Held, that he was not emancipated. *The King v. The Inhabitants of Rotherfield Greys, Oxon.* H. 3 & 4 G. 4.

Page 345

SETTLEMENT — By Apprenticeship.

Before the expiration of the term of an apprenticeship, the apprentice asked his mistress leave to go into another service, without mentioning where he was going. The mistress said she was not against it, if he could better himself. The apprentice then went and hired himself to A. B. in another parish for a year, at certain wages. He then returned to his mistress, and told her what he had done, and she said that she was not against it. The apprentice then went to his new place, and lived with A. B. for three months: Held, that the service with A. B. was not a service under the indenture, first, because

because there was not a particular assent of the mistress to that service; and, secondly, because the service with *A. B.* was not as an apprentice, but as a servant under a contract of hiring. *Rex v. The Inhabitants of Whichurch*, 4 G. 4. Page 574

SETTLEMENT — By Estate.

1. The lord of a manor granted a lease of a cottage for thirty-one years to *A.*, who resided in it above a year, and died, leaving a widow and three daughters. Administration was granted to the widow, but no distribution of the estate was made. After his death, the widow, and, by her permission, one of the daughters and her husband resided in it some years: Held, that the daughter, or her husband in her right, had not any equitable estate in the cottage, and that no settlement was gained by their residence in it. *Rex v. The Inhabitants of Berkswell*, E. 4 G. 4. 542
2. *A.* built a house on the waste of a manor by licence from the lord, resided in it two years, and then sold it to *B.* The latter sold it to *C.* for 30*l.*, but no conveyance was executed. *C.* resided in it five years, and paid 1*s.* per annum rent to the lord, and then sold his interest. No adverse claim was made: Held, that although *C.* paid a consideration of 30*l.*, when he purchased his interest, he did not acquire by purchase an interest or estate sufficient to confer a settlement within the statute 9 G. 1. c. 7. §. 5. *The King v. The Inhabitants of Hagworthingham*, E. 4 G. 4. 635

SETTLEMENT — By renting a Tenement.

1. Where a pauper resided for a year in a house in the parish of *A.*, and

during all that time had two subsisting parol contracts for two ponds, or the rushes and flags growing therein, which he was to have the exclusive right of cutting at his pleasure: Held that these were a sufficient tenement (being together above the value of 10*l.* per annum,) to confer a settlement in *A.* *The King v. The Inhabitants of All Saints, Cambridge*, M. 3 G. 4. Page 23

2. The master of a charity school, who was removable from it at pleasure, resided for seven years, rent-free, in a house of the annual value of 10*l.*, where other parish schoolmasters had resided before. Part of the house he underlet to the parish at an annual rent: Held, that this was a coming to settle upon a tenement of the value of 10*l.* per annum within the meaning of the 13 & 14 Car. 2., and that the pauper thereby gained a settlement. *Rex v. The Inhabitants of Lackenheath*, E. 4 G. 4. 531
3. A pauper serving a farmer was to have the liberty to feed two cows on his master's farm during the year. They were fed during the summer in the pasture of his master, and in the winter in his straw yard, with hay grown upon his lands. It was found that the keep of the two cows during the summer months required land worth five guineas annually, and to cut hay sufficient for the winter keep required land of the annual value of five guineas: Held, that the right to feed the two cows upon the pasture during the summer, was the only part of the contract which gave any interest in the land, and that the pauper did not thereby gain a settlement, the sessions having found the annual value of the pasture-feed to be less than 10*l.* *Rex v. Sutton St. Edmunds*, E. 4 G. 4. 556

4. After

4. After the passing of the 59 G. 3. c. 50., the pauper held together for a year a house and garden, and paid rent for the same during that period. They were taken of different persons at different times. The rent of the house was six guineas. The pauper underlet one room, communicating with the rest of the house by an inner door, and with the yard by an outer door. The rent of the garden was 3*l.* 15*s.* per annum, and it was occupied by the pauper himself: Held, that although there was a separate taking of the house and of the land, that this was a tenement within the meaning of the 59 G. 3. c. 50.; and, secondly, that, although one of the rooms was underlet, still the house continued to be the separate and distinct dwelling-house of the pauper within the meaning of that statute. *Rex v. The Inhabitants of North Collingham*, E. 4 G. 4.

Page 578

5. By one entire contract, a master agreed to give his servant 20*l.* a year, a cottage to live in, and the agistment of one cow for his own services; and the sum of 28*l.* and the agistment of another cow in consideration of his lodging and maintaining in the cottage two of the master's labourers. The annual value of the lands on which the two cows were depastured exceeded 10*l.*; but the annual value of land sufficient to depasture one cow only would have been less than 10*l.*: Held, that the pauper gained a settlement by the right to agist the two cows. *Rex v. The Inhabitants of Cherry Willingham*, E. 4 G. 4.

626

SEWERS.

Where the owner of land in a level is bound to repair a sea-wall abutting on his land: Held, that the

SHIP.

other landowners in the level cannot be called upon to contribute to the repairs of the wall, although it has been injured by an extraordinary tide and tempest, unless the damage has been sustained without the default of the party generally bound to repair. *The King v. The Commissioners of Sewers in Essex*, E. 4 G. 4. Page 477

SHAM BAIL.

See PRACTICE, 25.

SHAM PLEAS.

See PLEADING, 14.

SHIP.

1. An executory agreement to transfer a share of a vessel is void by the 34 G. 3. c. 68. s. 14. unless it contains a recital of the certificate of registry. *Biddell v. Leeder and Pulham*, H. 3 & 4 G. 4. 327
2. A. B. being sole owner of a ship by indenture of the 24th June, 1819, assigned three fourth shares of it to a creditor, as security for a debt. The deed contained clauses by which the creditor was to reconvey the three fourth shares upon payment of his debt, and a power of sale to the creditor, in case the debt was not paid within a given time. A. B. was to be permitted to freight the ship, and to load cargoes from time to time, &c., and was to insure the ship for the amount of the debt in the name of the creditor, or otherwise to assign the policies to him. At the time of the execution of the deed, the ship was absent from her port of registry on a voyage to North America; but all the forms prescribed by the ship registry acts, as to the transfer, were duly complied

had been made, by which all the land used for the purposes of the navigation by the proprietors thereof had been sold to them by the land-owners. A rule having been obtained for a new trial, the Court held, first, that by virtue of the provisions of this act of the 16 & 17 Car. 2., the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to and formed out of the earth excavated from a new channel, made for the first time under the act, as would enable them to maintain trespass; secondly, that as the purchase of the soil was not necessary for any of the purposes of the act, it was to be inferred that no such purchase had actually been made; and that the improbability of any such purchase ought to have been presented to the jury. *Hollis v. Goldfinch and Others*, H. 3 & 4 G. 4.

Page 205

3. Where in an action of trespass the lord of a manor set out various burthens borne by him, and then prescribed, not by reason of those burthens but generally as lord of the manor, for a toll upon all goods bought and delivered, or bought elsewhere, and brought into and delivered in a town within the manor, which from time immemorial had been parcel of the manor: Held, after verdict, that this was good as a claim of toll traverse, although the burthens set out did not constitute a sufficient consideration for a toll thorough.

Where a legal commencement of a prescription can be presumed, that, after verdict, is sufficient to support the claim. *Richards v. Bennett and Another*, H. 3 & 4 G. 4.

223

4. In trespass, *quare clausum fregit*, where the plaintiff names the close in his declaration, and the defend-

ant pleads *liberum tenementum* generally, without giving any further description of the close, the plaintiff is not driven to a new assignment, but is entitled to recover upon proving a trespass done in a close in his possession bearing the name given in the declaration, although the defendant may have a close in the same parish known by the same name. *Cocker v. Crompton and Others*, B. 4 G. 4.

Page 489

TRIAL.

See COSTS, 2. PRACTICE, 5.

TROVER.

Where the defendant having agreed to lend two persons, who afterwards became bankrupts, 200*l.* to be applied to a specific purpose, drew a cheque on his banker for that sum, and delivered it to them before their bankruptcy; and they not having used the cheque, returned it to the lender, after having committed an act of bankruptcy: Held, that their assignee could not maintain trover for the cheque. *Moore v. Barthrop*, M. 3 G. 4. 5

TRUSTEES.

See DEVISE, 1.

UNDERWOOD.

Firs and larches planted with oaks for the purpose of sheltering the latter, and cut from time to time, as the oaks grew larger and required more space, but when once cut, not growing again, and some of them yielding a profit by sale, are not saleable underwoods within the 43 *Eliz.*, the primary object of
3 H 2 planting

planting them being to protect the
woods, and not to derive a profit
from them *per se* by sale.

Scrabble. That they are not un-
derwood at all. *Rex v. Inhabitants*
of Ferrybridge, H. 3 & 4 G. 4.
Page 375.

UNDERWRITER.

See EVIDENCE, 14. INSURANCE, 1.

VARIANCE.

1. Declaration stated that the de-
fendant, at *Dublin*, made a promis-
sory note, and thereby promised
to pay the same at *Dublin*, without
alleging it to be at *Dublin* in *Ire-*
land: Held, that upon this declar-
ation the promissory note must be
taken to have been drawn in *Eng-*
land for *English* money, and, there-
fore, that proof of a note made,
and payable at *Dublin* in *Ireland*,
for the same sum in *Irish* money,
did not support the declaration.
Sproule v. Legge, M. 3 G. 4. 16
2. Declaration, in consideration that
plaintiff would procure *A. B.* to
grant a lease to defendant; the
latter promised to pay the plaintiff
170*l.* The proof was, that *A. B.*
having agreed to grant a lease to
the plaintiff, the latter undertook,
originally, to assign it to the de-
fendant for the consideration men-
tioned; but that afterwards a lease,
to which plaintiff was a party, and
assented, was granted immediately
by *A. B.* to the defendant. The
consideration to be paid by the
defendant to the plaintiff was not
mentioned in that lease: Held,
first, that the lease was not void on
account of this omission, the ad-
vocate's duty, imposed by the
60 G. 3. c. 18*th*, applying only to
considerations passing between less-
or and lessee; and, secondly, that

- the evidence proved the substi-
tution of a new contract to procure
a lease from *A. B.* to the defend-
ant in lieu of the original contract,
and that there was not any vari-
ance. *Boone v. Mitchell, M. 3 G. 4.*
Page 18
3. Where a count stated that *A. B.*
supplied the poor of the parish of
W. and other parishes in a work-
house: Held, first, that it was no
variance, the proof being larger
than the allegation. Secondly,
that the objection as to a variance
between the allegation of a supply
of the poor and the proof of a
supply of the poor in the work-
house, not being taken at *Nisi*
Prius, could not be afterwards
available. *West v. Andrews, M.*
3 G. 4. 77
 4. Where the declaration stated that
a bill of exchange was indorsed by
certain persons trading under the
firm of *H. and F.*, by procuration
of *J. D.*: Held, that this allega-
tion was supported by evidence of
J. D.'s hand-writing; and that he
being the managing partner in a
firm which carried on all business
of buying and selling, under the
designation of *H. and Co.*, was in
the habit of indorsing bills in the
manner above stated; although
there was no such person as *F.* in
the firm of *H. and Co.*, and no
direct proof that *J. D.*'s partners
were privy to those transactions.
One partner may act for the whole
firm by procuration. *Williamson*
v. Johnson, H. 3 & 4 G. 4. 146
 5. The defendant's attorney, upon
the taxation of costs, stated, that
there was error upon the record,
viz. a variance between the affi-
davit to hold to bail and the de-
claration. He had previously told
the plaintiff that he would never
recover the fruits of his judgment,
as the defendant was not in a situ-
ation to pay, he never having paid
him

him any thing on account of costs: the plaintiff having been served with the allowance of a writ of error, and the defendant having disclosed no other ground of error by his affidavit; the Court refused to set aside an execution issued after the allowance of a writ of error: *Eicks v. Sowerby*, H. 3 & 4 G. 4. Page 287

6. Where a declaration states that, by a certain indenture, "It is witnessed, &c.," and sets out the very words of the deed, there is no variance, although the legal effect of the whole deed may be different from that which the part set out imports. Where the defendant sets out on oyer a deed upon which the declaration is framed, he cannot, on demurrer, take advantage of a variance in an immaterial part between the deed as stated in the declaration and as set out on oyer. *Ross, Administrator de bonis non, v. Parker*, H. 3 & 4 G. 4. 358

7. Covenant by the reversioner against the assignee of the grantee. Declaration stated that A. and B. did grant licence for a term of years to C. to continue a channel open through the bank of a navigation, in order that the waste water might pass through the channel to the mills of C., the latter paying a certain annual sum therein mentioned. Breach, nonpayment of that annual sum. *Semble*, That upon the facts of the declaration A. and B. must be considered as having the sole ownership of the navigation, and the sole power of granting this privilege; and, in that case, that the deed would operate as the grant of an interest in an hereditament, and that the assignee of the grantee would be liable to an action by the reversioner within the statute 32 Hen. 8. By the deed produced in evidence, A. and B. were described as persons having the

greatest proportion or share in the profits of the navigation: Held, by this deed it appeared, that the grantor had not the power of granting the privilege of which the deed, as set out in the declaration purported to be a grant, and, therefore, that there was a variance.

Held, also, that the deed shewed that the assignee of the grantee was not bound by the covenants, inasmuch as it appeared that the grantors had not any legal or equitable estate in a real hereditament. *Earl of Portmore v. Bunn*, E. 4 G. 4. Page 604

VERDICT.

See PLEADING, 15. PRACTICE, 7.

VENDOR AND VENDEE.

1. The buyer of a parcel of wheat, by sample, has a right to inspect the whole in bulk, at any proper and convenient time; and if the seller refuses to shew it, the buyer may rescind the contract, *Lorymer v. Smith*, M. 3 G. 4. 1
2. Where the defendant bought of the plaintiffs a quantity of tobacco, upon a contract to pay one-fifth of the price at a day specified, and that the seller should look to his agent abroad, to whom the tobacco was consigned, for the remainder; the tobacco having been sold by the consignee at a considerable loss, the buyer was held liable for the difference between the proceeds and the four-fifths of the price stated in the contract, which remained unpaid. *Hoffman v. Heyman*, M. 3 G. 4. 7
3. The traveller of A. and Co. in London having called upon B. in the country for orders, B. gave an absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye at a certain price;

price; the traveller said the price was too low, but that he would write to his principals, and if B. did not hear from them in one or two days, he might consider that his offer was accepted. A. and Co. never wrote to B. but sent all the goods. Held, that this was not a joint order for them all, so as to make the acceptance of the cream of tartar the acceptance of the lac dye also, within 29 Car. 2. c. 3. s. 17. *Price and Others v. Lea, H. 3 & 4 G. 4.* Page 156

4. A. delivered a quantity of iron to a carrier, to be conveyed by the latter to B., the vendee in the country. The carrier having reached B.'s premises, landed a part of the iron on his wharf, and then finding that B. had stopped payment, reloaded the same on board his barge, and took the whole of the iron to his own premises: Held, that there was no delivery of any part of the iron so as to divest the consignor of his right to stop in transitu; the special property remaining in the carrier until the freight for the whole cargo was either tendered or paid, or until he had done some act shewing that he assented to part with the possession of the goods without receiving his freight. *Crawshay and Others v. Eades, H. 3 & 4 G. 4.*

181

5. An executory agreement to transfer a share of a vessel is void by the 34 G. 3. c. 68. s. 14., unless it contains a recital of the certificate of registry. *Biddell v. Leeder and Pulham, H. 3 & 4 G. 4.* 317
6. By a contract of sale, the property sold was to be paid for by ready money. The vendee induced the servant of the vendor to deliver it for a check upon a banker, by representing it to be as good as money; in fact he had overdrawn his account for many months, and

when the check was presented, payment was refused. On the same day that the goods were purchased, the vendee gave a warrant of attorney to a creditor, under which judgment was immediately entered up, and execution issued, and the property in question seized by the bailiff of a liberty. While it was in his custody, the original owner rescued it: Held, in an action brought against the latter by the bailiff of the liberty for the rescue, that the question whether the contract of sale was so vitiated by fraud as to prevent the property in the goods passing to the vendee, depended upon a question of fact, which ought to have been submitted to the jury, viz. whether the vendee had obtained possession of the goods with a preconcerted design not to pay for them. *Earl of Bristol v. Wilmore, E. 4 G. 4.*

Page 514

WARRANT.

Where a warrant was directed "to A. B. to the constables of W., and to all other his majesty's officers:" Held, that the constables of W. (their names not being inserted in the warrant) could not execute it out of that district. *The King v. Weir and Others, H. 3 & 4 G. 4.*

288

WAY.

1. A plea of a right of way stated a surrender to defendant of a copyhold, with all ways then used by the tenants and occupiers thereof; that defendant was admitted, and continued seised, and being so seised, and having occasion to use the way, committed the trespass. New assignment, that defendant used the way for other purposes, &c.: Held, that the defendant being landlord, had a right, while the

the

the copyhold was in the occupation of the tenant, to see the way to remove an obstruction; and that the words of the plea were sufficiently large to comprehend all the purposes for which a person seized might lawfully use the way. *Proud v. Holte, M. 3 G. 4. Page 8.*

2. A private act of parliament for inclosing the waste lands of a manor, reserved to the lord and his assigns all mines, &c. together with all convenient and necessary ways, &c. then already made, or thereafter to be made, and liberty of laying waggon-ways, &c. at his and their free will and pleasure, and to do all such other works, acts, and things as might be necessary or convenient for the full and complete enjoyment thereof, in as full, ample, and beneficial a manner as if that act had not been made. An action of trespass having been brought against the lord's assignee for laying a waggon-way over one of the allotments in an improper direction and manner: it was held, that the real question to be decided by the jury was,

whether the waggon-way had been laid in such a direction as a person of reasonable skill would have selected; and whether the mode adopted, was such as a prudent person would have adopted if he had been making the road over his own land, and not over the land of another. *Abson v. Fenton and Another, H. 3 & 4 G. 4. Page 195.*

WITNESS.

See BANKRUPT, 9. COSTS, 5, 6.
EVIDENCE, 13, 16. VARIANCE, 4.

WRIT.

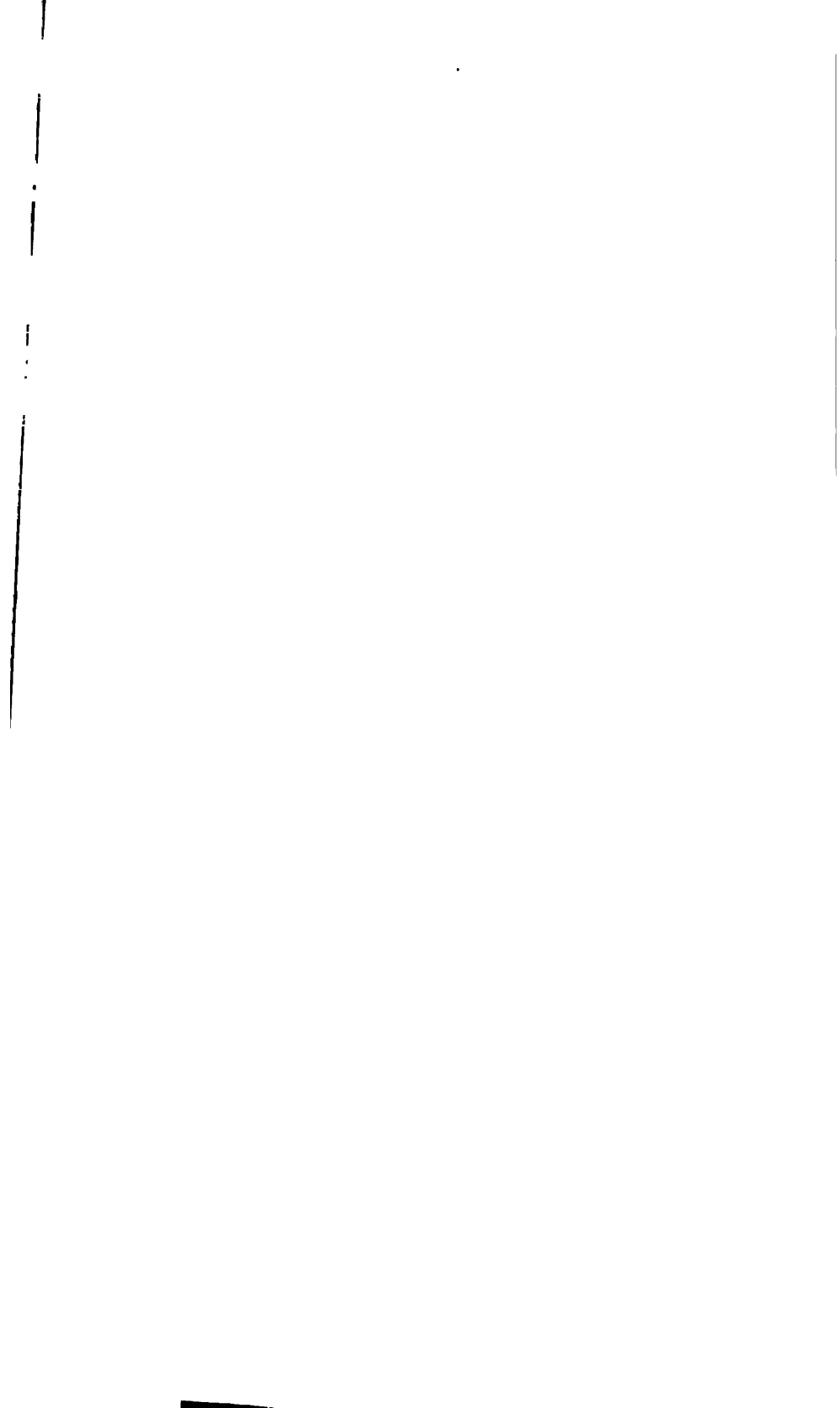
Before a writ is returnable, it may be altered as to the return day without being re-stamped, provided the last appointed return day be not beyond the time at which the writ might at first have been made returnable. *Durden and Another v. Hammond, M. 3 G. 4. 111*

WRIT OF ERROR.

See PRACTICE, 25.

135

[illegible]



Standard Law Library



3 6105 062 769 448

